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IN THE

Supreme Court of the United States

October Term, 1955

No. 256

LAWRENCE CALLANAN, CARL BIANCHI, L. A. THOMPSON, WILLIAM POSTER AND R. M. SECOR, *Petitioners,*

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	4
Reasons for granting the writ	11
Conclusion	27
Appendix	
Opinion below	1a
Opinion in *United States* v. *Ryan*, 2 Cir., Docket No. 23546, July 1, 1955	18a
Judgments	38a

CITATIONS

CASES:

Bianchi v. *United States*, 219 F. (2d) 182, No. 646, Oct. Term, 1954, certiorari denied, April 25, 1955	11, 12, 13, 14, 15, 21, 22
Nick v. *United States*, 122 F. (2d) 660, certiorari denied 314 U.S. 687	23
Spies v. *United States*, 317 U.S. 492	22
United Brotherhood of Carpenters v. *United States*, 330 U.S. 395	20
United States v. *Compagna*, 146 F. (2d) 524, certiorari denied 324 U.S. 867	23
United States v. *Kemble*, 198 F. (2d) 889, certiorari denied 344 U.S. 893	20
United States v. *Ryan*, 2 Cir., Docket No. 23546, July 1, 1955	16-17, 18

Page

STATUTES:

Hobbs Act, 62 Stat. 793, 18 U.S.C. § 1951 ....2, 3, 5, 23

28 U.S.C. § 1254(1) 1

Norris-LaGuardia Act, Sec. 6, 47 Stat. 71, 29 U.S.C. § 106 .....2, 4, 19, 20, 21

Taft-Hartley Act, Sec. 302, 61 Stat. 157, 29 U.S.C. § 186 .....2, 3, 17, 18, 19, 21, 22, 26

New York Penal Code, Sec. 851 14

MISCELLANEOUS:

Brief for United States, *Bianchi* v. *United States*, No. 646, Oct. Term 1954 .....12-14, 15, 21-22

89 Cong. Rec. 3195 24-25

89 Cong. Rec. 3210 25

89 Cong. Rec. 3211 25

91 Cong. Rec. 11903 24

91 Cong. Rec. 11912 25

91 Cong. Rec. 11913 26

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OPINION BELOW

The opinion of the Court of Appeals is set forth in the Appendix, *infra,* pp. 1a-17a, but is not yet officially reported.

JURISDICTION

The judgments of the Court of Appeals were entered on June 3, 1955. A timely petition for rehearing was filed, and this petition was overruled on July 5, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. In this case an employer, about to perform a construction contract, told a labor representative that he was fearful of loss because the unions involved had performed inefficient work on a previous contract and he was afraid the same inefficiency might be repeated. The evidence showed no illegal or unfair labor practices in the work on the previous contract. The labor representative was not responsible for the inefficiency complained of. He made no threats. He merely promised to see other union representatives and to speed up the work for a cash payment.

The question presented is whether, under these circumstances, the payment by the employer is one made under compulsion and constitutes extortion under the Hobbs Act, 18 U.S.C. § 1951.

2. At the trial the greater part of the evidence was offered in an attempt to show that defendants were responsible for past illegal activity in connection with the previous contract. The court below found that no evidence of illegal or unfair practices was shown.

The question presented is whether, having admitted this evidence, failure to give the instruction required by § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, that clear proof of responsibility must be shown is error.

3. The court below construed the definition of extortion under the Hobbs Act in such a way as to make the offense substantially the same as the offense of breach of trust under § 302 of the Taft-Hartley Act, 29 U.S.C. § 186.

The question presented is whether, if such a construction of the Hobbs Act is sustained, the refusal of

the Court to instruct the jury on the difference between the lesser offense under the Taft-Hartley Act and the greater offense of extortion under the Hobbs Act is erroneous.

4. Whether the language of the Hobbs Act, 18 U.S.C. § 1951, making unlawful "the obtaining of property induced by wrongful use of actual or threatened force, violence or fear" includes fear of loss of expected profits not caused by force or violence?

STATUTES INVOLVED

Hobbs Act, 18 U.S.C. § 1951, 62 Stat. 793:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> "(b) As used in this section—
>
> * * *
>
> "(2) The term 'extortion' means the obtaining of property from another, which his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right."

Taft-Hartley Act, 29 U.S.C. § 186, 61 Stat. 157:

> "(a) It shall be unlawful for any employer to pay or deliver, or agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce."

Norris-LaGuardia Act, 29 U.S.C. § 106, 47 Stat. 71:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

STATEMENT

This case involves important and far-reaching issues which concern the proper interpretation and application of the Hobbs Act. We believe that these issues can be presented more briefly if we discuss the opinion and the facts together, since they are inextricably intertwined.

The essential facts from which this prosecution arose are quite simple. In 1951 the O. R. Burden Construction Company, the victim of the alleged extortion in this case, built an interstate pipeline for the Platte Pipeline Company. In May of the next year the Burden Company contracted to construct another pipeline for the Sinclair Pipeline Company.

On May 16, 1952, before work began on the Sinclair contract, O. R. Burden, president of the company, and his vice-president, one Thibodaux, met with representatives of the various unions involved, including petitioner Callanan as agent for the pipefitters, to discuss working conditions, hours and wages. (R. 269) When the meeting adjourned for lunch Callanan invited Burden to eat with him. The Government's case rests entirely on Burden's testimony as to what occurred at this luncheon meeting. (R. 269-270) Burden initiated the

conversation by complaining to Callanan that "we had suffered terrific losses on the Platte line" and that as to the new Sinclair contract he was afraid of "First, loss financially; second, was danger to our men; third, danger to our property. I told Callanan that this all would have to be changed." (R. 270).

There was no evidence that defendants had been responsible for any act which would create fear of any kind on the part of Burden. Indeed, there was no evidence that any previous labor activity had been unlawful or unfair. The court below said in this connection:

> "We do not believe that any of this evidence goes to the extent of establishing that any illegal or unfair labor practices existed prior to the alleged extortion demands." (Appendix, *infra,* p. 11a)

Burden explained at the trial that the important things he had in mind were (R. 270):

> "We wanted the stewards to work; we wanted a better brand of welding; we wanted more work per day per man. Those were the three most important points."

In response to this complaint by Burden, Callanan agreed that for a payment of $28,000 to be shared between himself and the other labor representatives (R. 271):

> *"he would personally see and talk to the other crafts ... and see that the job was speeded up."*

This is the entire case of extortion under the Hobbs Act. There was no "actual or threatened use of *force* [or] *violence* . . ." The court below held that a violation had been shown through "actual or threatened

use of *fear*". Callanan did not threaten to cause unfair labor stoppages or labor difficulties on the new contract, and no such illegal acts had been shown in the past, as the court below stated.

Callanan promised to use his influence to speed up the work. Burden gave, and Callanan received, a payment for a breach of trust. On the basis of this evidence, and this evidence alone, the court below sustained conviction of all the defendants on the serious felony of extortion and conspiracy to extort under the Hobbs Act. All the defendants except one were sentenced to twelve years on each count, the second sentence being suspended.

The case as ultimately affirmed in the Court of Appeals was not the case charged in the indictment. This had consisted of two counts. The first count was for conspiracy to extort and, in support of this, the indictment charge defendants with: (1) demanding money *for their personal benefit;* (2) calling strikes causing work disputes, work stoppages and difficulties * * * not for the purpose of obtaining labor objectives; (3) demanding that unnecessary workmen be hired "who would not have been hired but for defendants' use of force, violence and fear"; (4) waiving such demands in consideration of money; (5) demanding the use of wasteful methods and labor practices; (6) waiving such demands in consideration of money; (7) threatening to prevent the construction company from utilizing labor in the customary manner unless money was paid; (8) *assuring that the performance of Burden's contract would proceed in a workmanlike and efficient manner;* (9) threatening to exercise their authority as labor representatives to cause strikes and work stoppages; and (10) making demands and threats to instill fear in the mind of O. R. Burden. (R. 1-6).

Neither was the charge presented by the second count of the indictment anything like the offense the Court of Appeals found when it sustained the conviction. That count charged that the defendants (1) threatened and committed acts of violence to persons and property; (2) caused Burden to fear that he would suffer a financial loss and injury to his employees and to his property; (3) threatened to call and conjure up strikes, etc.; (4) threatened to make arbitrary and excessive demands for unnecessary workmen; (5) threatened to use their offices as labor representatives to enforce wasteful methods. (R. 6-9).

The Court of Appeals considered the case, however, as though the entire second count, and all but charges (1) and (8) of the first count were immaterial and surplusage,—as indeed they were if the court's theory is correct. The prosecution was unable to show at the trial that there were any strikes called, any demands by Callanan or any other defendant that Burden hire unnecessary men, any use of violence as part of the conspiracy, or any threats on the part of Callanan or others to enforce demands for payment by using or threatening violence or unfair labor practices. The sole offense found by the Court of Appeals consisted of the receipt of money for the personal benefit of the defendants.

Nonetheless, the jury was permitted to hear evidence on the issues which the Court of Appeals now holds are immaterial. The great bulk of the evidence at the trial dealt with alleged unfair labor practices on the previous Platte contract. The Government built its case on the theory that the unions on the previous contract had insisted on unnecessary labor and that the workmen had engaged in a voluntary, unfair and costly

slowdown. The defense introduced voluminous testimony to show that this was not true and it is apparent from this record that such extraneous factors as weather had a great deal to do with the high cost of the work on that contract. When the petitioner attempted to prove that the reason for the loss on that contract was a ruinously low bid made by the Burden Company the evidence was excluded. The court instructed the jury that it was immaterial whether or not Burden lost money on the Platte contract and based its charge, not on the Court of Appeals' theory that previous unfair labor practices need not be shown, but rather on the assumption that the defendants were responsible for unfair labor practices on the Platte contract. On this issue the court charged:

> "Now, the question is, first, before the conversation alleged as of the 16th of May, 1952 and thereafter, what, if any, delays were caused on the pipe lines by labor troubles which were directly or indirectly affecting the progress of the lines that was attributable to either of these defendants and the defendants as a whole.
>
> "Was there labor strife?
>
> "Were there labor troubles?
>
> "That is a matter for you to decide.
>
> "The testimony regarding the delays on account of lack of pipe, lack of a ditch, that does not bear very strongly on the issues, except it may show that there were no delays due to labor troubles, or that the delays were not due to any activities of these defendants through their respective unions". (R. 673)
>
> "If you find that the defendants did enter into a conspiracy as charged, then proceed to determine if any one or more of the parties to the parties to

the conspiracy, so found, committed any one or more of the overt acts charged in the indictment, to effect the objects of the conspiracy, and whether or not the conspiracy affected interstate commerce." (R. 688)

"Before you can convict the defendants, or either of them, on count two of the indictment, there must be a like finding as to intent of the defendants as to the acts charged to have been committed by the defendants, and as charged in count two of the indictment, that they, the defendants, thereby intended to and did interfere with interstate commerce". (R. 690)

We think it is fair to say that the entire case against the defendants as presented at the trial was based on their alleged responsibility for the labor activities on the Platte contract and on the implicit assumption that these were unfair labor practices which had diminished Burden's profits. In spite of this the trial court categorically refused to give the instruction required by Section 6 of the Norris-LaGuardia Act informing the jury that there must be clear proof of defendants' responsibility for the previous acts of their unions.

The Court of Appeals recognizing the necessity of the Norris-LaGuardia Act instruction if the case were based on the labor difficulties on the Platte contract escaped the dilemma by holding that there had been no previous unfair labor practices and that all this voluminous evidence became surplusage.

The sole incident of violence was an assault on Leon Blackwell, a teamster labor steward, by a workman seeking employment on the Platte contract in October 1951. There was no foundation for this testimony, no

evidence that defendant Callanan ever knew about the assault since the parties did not belong to his union. No relationship was shown between this incident and the payment of money. Yet the trial court singled it out for special emphasis as follows:

> "The Platte project was the first one. Work started on it some time in May of 1951. In connection with this line, there was testimony by the witness Blackwell of an assault made on him on October 16, 1951. As I recall his testimony, it was that he was a steward on the job representing the union of which the defendant Thompson was the agent. If that assault took place as it was testified to by the witness Blackwell—and I don't recall any contrary testimony as to how the assault was perpetrated—it was a reprehensible act and it cannot be condoned or mitigated by any intelligent, civilized person. He testified that about the 13th of October two men came on the job with a letter from the defendant Thompson, telling him to give the men who had the letter the best jobs that he had. According to Blackwell's testimony, no jobs were open; and a day or two later, after he had informed these two men of that, when he had refused to give them work, he saw their car in a ditch apparently stalled and he got out to help them, and on this occasion he testified that he was knocked down by one of the men, who had a chain in his hand, and while he was on the ground one of the men kicked him in the mouth and knocked out several of his teeth." (R. 674-675)

The Court of Appeals excused the admission of this testimony on the theory that it (Appendix, *infra*, p. 10a):

> "was admissible as bearing on the reasonableness of Burden's fears."

We assert that a fair reading ot the court's entire instructions does not permit the conclusion that the Blackwell incident was limited to Burden's state of mind. It was the only act of violence in the entire record and the court in its instructions specifically told the jury that on the evidence they could find that the defendants were responsibile for violence. And in addition to allowing the jury to find responsibility for violence the court played up this single incident in the most inflammatory and prejudicial manner.

REASONS FOR GRANTING THE WRIT

I

The court below, in sustaining this conviction, has created a precedent which will seriously affect the administration of criminal justice in labor management relations. It has held that extortion may be found in the absence of any previous unfair labor practices or any threats of future unfair practices from the mere payment of money to a labor representative in the hope of better labor relations.

The most recent case involving the construction of the Hobbs Act which has been before this Court is *Bianchi* v. *United States,* No. 646, Oct. Term, 1954, where certiorari was denied. There the defendants contended that fear of economic loss was not a sufficient basis for extortion. The *Bianchi* case stands for the principle that a threat to call a strike and thus cause economic loss is sufficient to sustain a conviction under the Hobbs Act.

The decision of the court below in this case goes far beyond the *Bianchi* case. It adopts such a broad construction of extortion as to take away all previously

adjudicated requirements for conviction under the Hobbs Act and its predecessor.

Indeed, the opinion of the court below is contrary to the construction of the Act by the trial judge in this case. It is contrary to the theory that the Government adopted in presenting the evidence below. Finally, it is contrary to the construction of the Hobbs Act urged on this Court by the Government in its opposition to the petition for certiorari in the *Bianchi* case.

The Government's conception of the elements of the offense of extortion which it presented to this Court in opposing certiorari in the *Bianchi* case was as follows:

> "In describing the elements of the offense charged in the indictment, the judge told the jury that they must find, *inter alia*, that petitioners 'made express or implied threats * * * that industrial strife would ensue' unless their demands for money were complied with, and that they 'made such demands for money for their own personal profit and not in the interests of the members of their respective unions'. He further charged:
>
> > The mere receipt of money or anything of value by a labor representative of employees from the employer of such employees is not of itself sufficient to constitute an offense under the indictment; but before you can convict any defendant under this indictment it is incumbent upon the Government not only to prove beyond a reasonable doubt that each defendant received or agreed to receive from Felix Johnson money or other things of value, but they must go further and prove beyond a reasonable doubt that the defendants committed some acts, the likely effect of which would be to induce fear in Felix Johnson, and if the Government

fails to prove fear, the defendants should be acquitted.

In the light of this charge, and the evidence in this case, there is no substance in petitioner's contention (Pet. 29-34) that it was error for the judge to fail to charge on the elements of the Taft-Hartley Act and to permit conviction thereon as a lesser included offense. As petitioners themselves state, the Taft-Hartley offense relates essentially to bribery, and bribery and extortion are mutually exclusive. *If the employer paid the money as a bribe, petitioners could not have extorted it through fear. People* v. *Feld,* 262 App. Div. (N.Y.) 909 (1941); cf. *Hornstein* v. *Paramount Pictures, Inc.,* 292 N.Y. 468 (1944). Petitioners did not, as did the defendant in the *Feld* case (*supra*), offer evidence to the effect that they had taken money as a bribe. There was thus no reason for the judge to charge on a defense not made. The judge did charge in the portion quoted above that the mere receipt of money by a labor leader did not constitute the offense charged in the indictment. He also charged that, before petitioners could be found guilty, the jury had to find that they made threats for the purpose of extorting money for themselves. This charge related to the acts of the petitioners, not the state of mind of the employers, so that petitioners are in error in saying (Pet. 33) that the difference in the offenses can turn on the timidity of the victims. As the judge correctly charged, petitioners were guilty under the Hobbs Act only if they themselves used fear to extort. Since the *judge correctly charged on all the elements* necessary to convict, he was not required to charge on the elements of some other offense not charged and therefore not before the jury for consideration." (Brief for United States, pp. 16-18, *Bianchi* v. *U. S.*, No. 646, Oct. Term 1954). (Emphasis supplied).

We call particular attention to the Solicitor General's admission that the trial court in the *Bianchi* case correctly stated the elements necessary for a conviction under the Hobbs Act. The opinion of the court below contradicts the analysis of the elements of the offense made by the court in the *Bianchi* case and approved by the Solicitor General. The extent to which the opinion below departs from the *Bianchi* case is shown by the following analysis:

(1) In *Bianchi* the court instructed that the jury must find that defendants made express or implied threats that industrial strife would ensue unless money was paid. The trial court similarly charged here. The decision below dispenses with the requirement of any sort of threat in the following language:[1]

> "If fear was created in the victim's mind, if such fear was a reasonable one, and if the defendants by making use of that fear extorted money or property, the foundation for guilt is established.

---

[1] The Government in its *Bianchi* brief stated the Hobbs Act was designed to conform to the definitions of the New York Penal Code (Brief for the United States, pp. 13-14). Section 851 of the New York Penal Code requires that extortion by fear be induced by threats and provides:

> "What threats may constitute extortion. Fear, such as will constitute extortion, may be induced by an oral or written threat (1) to do an unlawful injury to the individual threatened, or to any relative of his or to any member of his family or to a corporation of which he shall be an officer, stockholder, employee or agent; or (2) to accuse him, or any relative of his or any member of his family, of any crime; or (3) to expose, or impute to him, or any of them, any deformity or disgrace; or (4) to expose any secret affecting him or any of them; or (5) to kidnap him or any relative of his or member of his family; or (6) to injure his person or property or that of any relative of his or member of his family by the use of weapons or explosives."

> In the *Bianchi* and *Hulahan* cases there were express threats that if the money was not paid labor difficulties would follow. In this case we find no evidence of a direct threat." (Appendix, *infra*, p. 5a)

As for implied threats, the logic of the opinion shows that none are necessary to sustain a conviction. Playing on the hopes of the victim, offering him a service which will increase his gain is held to be sufficient.

(2) The court in *Bianchi* instructed the jury that it was incumbent on the Government to prove not only the receipt of money but also that defendants had committed acts the likely effect of which would be to induce fear in their victim,—the same instruction that the trial judge gave here. The decision of the court below abolishes the requirement that the fear of the victim be a consequence of the defendants' act.

(3) In the *Bianchi* case the alleged victim was afraid that he would be subjected to illegitimate and unlawful labor restraints if the money was not paid. Here, as the court below found, there was no such fear and no unlawful or unfair labor practices existed. Money was paid for a promise to speed up the work and to relieve Burden from the consequences of lawful activities on the part of the union. A desire to increase his profits by getting more work out of the men is considered by the court below to be the kind of "fear" on which extortion may be based.

(4) And finally the opinion below contradicts the assertion of the Solicitor General in the *Bianchi* case that bribery and extortion are mutually exclusive.

In effect, the decision of the court below is that where an employer pays a labor representative in the

hope of gaining better labor relations, he is the victim of extortion because of his "fear" that he will not get better labor relations without such payment.

This is in conflict with the views expressed both by the majority and the dissent in *United States* v. *Ryan*, 2 Cir., Docket No. 23546, July 1, 1955. There Ryan, a labor official, received a series of payments from employers. The purpose of the payments was obviously the same as it was in this case, to assure friendly labor relations and to avoid difficulties with the union. There was no express promise shown but neither is there any definite promise in this case. All Callanan promised to do was to see the other representatives and vaguely to speed up the work. This was a perfectly lawful thing for him to undertake. The only illegality lay in receiving the money. Hence we consider that the factual situation in this case and the *Ryan* case are for all legal purposes the same. Under these similar facts, the majority in the *Ryan* case held unequivocally that "there was no evidence of extortion (or the like)." (Appendix, *infra*, p. 23a)

In his dissenting opinion, Judge Hand said:

> "... the employer did not bribe the accused; it did what has been done, time out of mind, when one person, knowing that he is likely to have continuous dealing with another, in which the second person will be acting as a fiduciary, wishes to insure a friendly approach to the fiduciary; and makes him presents or does him favors, or in other and less palpable forms tries to turn the edge of his allegiance. Although § 186 deals only with the grosser forms of this evil, it presupposes a more than ordinary fiduciary defection. A union official has a double loyalty: first, he owes it to the members of his union, who have chosen him to repre-

> sent them; next, he owes it to those employees, who are not members, but in favor of whom the law has nevertheless imposed on him an equal duty. Surely, it was altogether likely that Congree should wish to put an end to such abuses by both parties—the unions and the employers." (Appendix, *infra,* pp. 34a-35a)

These observations exactly fit the present case. Burden paid Callanan to obtain his loyalty and to induce him to breach his fiduciary relationship to his union. Callanan promised to do nothing more than talk and persuade in the vague area of efficiency and the hiring of unnecessary labor. This is not a bribe but a breach of trust. In the absence of the Taft-Hartley Act, it would not have been a crime.

Thus both the majority and the dissent in the *Ryan* case are authority for the proposition that payment of money to divert the loyalty of a labor representative and to cause him to break his trust is neither bribery nor extortion. There is no difference in view between the majority and the dissent in *Ryan* on this issue. Their only difference lies in the definition of a labor representative, a question which is irrelevant here.

We can see no difference between the facts of the two cases. The motivation of the employers in each case is the same. A difference is not created by the fact that the court below labels that motivation "fear of economic loss." In both cases the employer was trying to obtain the same kind of advantage. Both employers were acquainted with the general labor situation and with what a friendly labor representative could do for them.

The fact that Callanan made a promise in vague terms, whereas Ryan accepted the money in silence, is not a real difference. No employer would take the risk of violating the Taft-Hartley Act by paying a labor representative for a breach of trust without expecting to get in return what Callanan promised.

However broadly the term extortion is construed, it necessarily involves some degree of compulsion exercised by the defendant on the victim. No element of compulsion can be found in this case. No threats were made. Burden was not harassed by any act for which the defendants were responsible. There were no illegal or unfair activities on the part of the union. The only inducement Burden had for paying money was the hope of better labor relations and more work. To say that a man who paid money on such an inducement has been the victim of extortion is to broaden the act to cover all cases where a fiduciary accepts money in violation of trust.

The confusion created in the judicial administration of criminal labor laws created by the decision below is intensified if it is read in connection with the decision in the *Ryan* case. Under the majority opinion in the *Ryan* case, neither the employer giving money nor the labor representative receiving it commits an offense under the Taft-Hartley Act, unless the labor representative is the exclusive bargaining agent for the union. But individuals are practically never exclusive bargaining agents. Thus the Taft-Hartley Act is given an application so limited as to be almost nonexistent. Therefore, the employer giving money is practically exempt from prosecution.

The labor representative, on the other hand, who accepts the employer's money though he may be im-

mune under Taft-Hartley, nevertheless may be prosecuted for the more serious felony of extortion according to the decision below. That decision declares as a matter of law that a breach of trust which Congress designated in the Taft-Hartley Act as a misdemeanor makes a labor representative guilty of extortion and subjects him to a 20-year prison sentence.

Thus the combination of these two decisions creates a result which immunizes the employer and vastly increases the penalty for the labor representative for precisely the same breach of trust. The man who pays the money goes free, the man who receives it finds his penalty increased twenty-fold. Such a result is an anomaly which could not have been intended by Congress. We think this Court should dispel this confusion and impairment of rational justice by holding that payments for a mere promise to an employer that a labor representative will act as his intermediary to secure better labor relations by talking to other union officials without any threat and in the absence of any previous unfair labor practices is not and cannot be extortion.

II

The greater part of the evidence offered by the prosecution was pursuant to an attempt to show that the defendants were responsible for oppressive labor practices in work on the previous contract. There was a single act of violence, the Blackwell incident. The court instructed the jury that they must find the defendants were responsible for all of these oppressive labor activities in order to convict. (R. 669-670, 673) At the same time, the trial court refused to give the instruction required by § 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106, to the effect that responsibility of

labor representatives for the actions of their unions must be shown by clear proof. (R. 711-713)[2]

In reviewing the failure to give the Norris-LaGuardia instruction, the Court of Appeals conceded it was a close question. It held, however, that since there were no unlawful activities on the previous contract, the question of the defendants' responsibility became immaterial. With respect to the Blackwell incident, the court below said its only purpose was to show Burden's state of mind and hence the Norris-LaGuardia instruction was not required.

The court below sustained the admission of evidence of previous labor activities on the ground that this was "cumulative evidence" which "even if wrongfully admitted, would not constitute prejudicial error." (Appendix, *infra,* p. 12a) If we assume that the court was right in its construction of extortion, it became all the more necessary to protect the defendants by the Norris-LaGuardia instruction, where evidence of previous labor difficulties was admitted. Under the court's theory, the offense of extortion was proved by the mere acceptance of money. If this be true, the only purpose of evidence of previous labor difficulty would be to present to the jury an aggravated offense. Certainly the prosecution's case would have more jury appeal if the jury blamed the defendants for the past oppressive conduct of their unions. Here the defendants were unquestionably blamed by the jury for the hiring of unnecessary labor, for slow-downs, for inefficiency and for a single act of violence in the absence of any proof whatever that any of them had anything to do with these oppressive practices.

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[2] *United Brotherhood of Carpenters* v. *United States,* 330 U.S. 395; *United States* v. *Kemble,* 198 F. 2d 889, 892 (3 Cir. 1952), cert den. 344 U.S. 893.

The court below in effect had ruled that evidence of past labor practices may be introduced to aggravate the offense and at the same time the defendants may be deprived of protection of the Norris-LaGuardia instruction when the jury assesses the blame for those practices. This is a most dangerous precedent if the court's construction of the Hobbs Act is allowed to stand. It permits defendants to be blamed for the acts of others without the instruction which the Norris-LaGuardia Act requires in such circumstances.

Of course this issue will not be reached unless the Court declines to follow our reasoning on the previous question.

III

We present a third point, which also need not be reached unless our first point is rejected.

Defendants requested the trial judge to explain to the jury the difference between a breach of trust penalized by the Taft-Hartley Act and extortion under the Hobbs Act. We believe it was the defendants' right to have the jury told the difference between a compulsory payment, which is the essence of extortion, and a voluntary payment, which though criminal would not be extortion.

In the *Bianchi* case, such an instruction was requested and refused, and this Court denied certiorari. But in that case the evidence was clear that the payment was not voluntary. The defendants there threatened to stop all work if they did not receive cash. In their opposition to certiorari on that ground, the Solicitor General followed the theory of the construction of the Hobbs Act, which we urge here in our first point. He said,

> "As petitioners themselves state, the Taft-Hartley offense relates essentially to bribery, and bribery and extortion are mutually exclusive. If the employer paid the money as a bribe, petitioners could not have extorted it through fear." (Brief for United States, p. 17, *Bianchi* v. *United States, supra*).

It was this argument by the Government which presumably caused the Court to deny certiorari in *Bianchi*.

As the case is now presented, *if the decision of the court below be approved,* payments made in the hope of obtaining better labor relations without more may constitute extortion. The offense covered by the Taft-Hartley Act thus becomes substantially the same as extortion under the Hobbs Act. The only difference we can imagine is that previous oppressive practices might constitute compulsion, where a less aggravated case might properly be brought under the Taft-Hartley Act.

If this be a proper construction of the Hobbs Act, we assert that the case of *Spies* v. *United States,* 317 U.S. 492, required the court to point out to the jury the difference between a compulsory and a voluntary payment. We believe that the *Spies* decision stands for the principle that, where the same overt act can be used against the defendant in prosecutions under two separate criminal statutes, similar except that each requires a different intent, the court should explain that difference.

IV

Although this Court rejected certiorari in the *Bianchi* case, based on the argument that extortion under the Hobbs Act is restricted to fear of force and violence, we nevertheless wish to urge it again. The Court, of course, need not reach this question unless our argument on our first point is rejected.

We argue here that an offense under the Hobbs Act must involve the wrongful use of actual or threatened force, violence or fear of such force or violence causing injury to persons or property. Fear of loss of profits from extraneous causes is not sufficient.

The Act makes illegal the obtaining of property through the "wrongful use of actual or threatened force, violence or fear ...". In this case, as the court below held, there was no showing that force or violence were employed by the petitioner to induce the payment. Nonetheless, the court held that Burden's testimony demonstrated that he did fear losses on the new contract and that " 'fear' as used in the extortion definition of the Hobbs Act would include fear of economic loss." (Appendix, *infra*, p. 3a)

We submit that the word "fear" as used in the definition must be limited to fear of "force" and "violence" and be qualified by those previous words. "Fear" undefined includes anxiety over any kind of trouble. Properly construed under the rule of *ejusdem generis*, it is an ambiguous word which must be held to be qualified by the previous more specific terms.

The legislative history of the Act makes it clear that this was the intention of Congress. Congress during the debates on the Hobbs Act was careful not to include bribes offered because of fear of economic loss. The bill which went to committee was practically identical with the Anti-Racketeering Act, which the Hobbs Act eventually repealed. The Anti-Racketeering Act outlawed obtaining property by "use or threat to use force, violence or *coercion*" (emphasis added) and, under the precedents at that time, including *Nick* v. *United States*, 122 F. 2d 660 (8th Cir. 1941), and *United States* v. *Compagna*, 146 F. 2d 524 (2d Cir.

1944), would have included economic coercion and fear. Congress, however, as a result of hearings unfortunately not reported, struck the word "coercion".

Furthermore, in explaining the bill on the floor after it was reported Mr. Gwynne made clear the elements which would have to be proved:

> Mr Gwynne: ". . . Here is what a prosecutor would need to allege and to prove to get conviction under this law if this bill becomes law:
>
> "First, they would need to prove that the activity complained of in some way affected interstate commerce; second, they would have to prove that there was an actual, not a theoretical, taking of personal property; third, *they would have to prove that the taking was by violence, by personal violence, or by actual threats of personal violence,* and the, fourth, they would have to prove that the acts done—they might be violent, they might take something, but the Government would have to prove in addition that the acts did not come within the exceptions set out in Title III" (91 Cong. Rec. 11903). (Emphasis supplied).

The entire emphasis of the debates indicates that Congress was directing the Hobbs Act to the use of labor force or violence, and that fear of economic losses not caused by threats of such violence was excluded:

> Representative Hobbs: ". . . I am talking about what has already happened and the decision of the Supreme Court in the Local 807 case, which the gentleman made reference to, has already decided that no matter how much violence a union man might use in seeking employment, he could not be punished under the 1934 Anti-Racketeering Act. If he commits murder, or if he commits as-

sault with a weapon, it is all right under the anti-racketeering law . . ." (89 Cong. Rec. 3195).
* * *

Representative Hancock: ". . . Among the worst offenders have been certain locals of the Teamsters' Union in New York City.

"In that City Local 807 asserted that its members had the sole and exclusive rights to drive trucks of farm produce through the streets of New York to the Washington Market. Farmers driving their own trucks . . . were waylaid on the outskirts of the City and were compelled by physical violence to hire, or, at least, to pay a day's wages to members of Local 807 before they could proceed to market . . .

". . . According to that (the Local 807 decision) any thug belonging to a teamster's union may climb on a farmer's truck, beat him over the head with a club and extort a day's pay as a truck driver . . ." (89 Cong. Rec. 3210).

Representative Jennings: "Mr. Chairman, this Bill proposes to correct the condition brought about by the holdings of the Supreme Court of the United States in the case of those convicted for robbery and beating up of farmers and truckers . . . That opinion . . . holds expressly that Congress, by the language used in the Act of 1934, meant to legalize robbery by the use of force, by beating men, by holding them up when they are engaged in interstate commerce" (89 Cong. Rec. 3211).

Representative Hobbs: ". . . Mr. Chairman, I want to make it perfectly clear that *the sole and simple purpose, the single purpose of this Bill is to do the best we can to protect interstate commerce and free the highways and streets of this country of robbers . . .*" (91 Cong. Rec. 11912). (Emphasis Supplied).

> Representative Whittington: "... The bill is to prevent a repetition of the physical violences by members of labor unions on those engaged in interstate commerce. It is to prevent a repetition of the assaults and attacks upon the drivers of trucks with produce entering New York City and similar cases ..." (91 Cong. Rec. 11913).

We submit that the legislative history of the Act indicates clearly that Congress did not intend it to extend to payments induced by fear of economic losses not caused by violence. If there were any doubt about this, the subsequent passage of § 302 of the Taft-Hartley Act in the Eightieth Congress demonstrates that Congress considered that the taking of money by a labor leader for the use of his influence was a lesser offense akin to bribery, and did not constitute the serious felony of extortion under the Hobbs Act. The Court of Appeals' unwarranted extension of the language of the Act violates well-settled principles of statutory construction, is flatly contrary to the clear import of the words employed by Congress, and will drastically amend the Act to reach any case of acceptance of money by a labor leader.

CONCLUSION

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 15,139

LAWRENCE CALLANAN, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

[June 3, 1955].

Before SANBORN, COLLET, and VAN OOSTERHOUT, Circuit Judges.

VAN OOSTERHOUT, Circuit Judge.

The appellants, Callanan, Bianchi, Thompson, Poster, and Secor, who were defendants below and will hereinafter be designated as defendants, appeal from conviction, judgment and sentence upon an indictment in two counts charging each of them with conspiracy to extort and the substantive offense of extortion, the indictment being based upon Title 18, Section 1951, U.S.C., known as the Hobbs Act or the Anti-Racketeering Act. The extortion charged was obtaining $28,000 from the Burden Construction Company, paid by reason of Burden's fear of economic loss. The Burden Construction Company was engaged in several pipe line construction contracts in Missouri, which the indictment alleges involved interstate commerce. Defendants

were labor representatives of various crafts supplying labor to the construction project.

Defendants in their brief set out in 15 divisions the reasons why they contend they are entitled to a reversal. As rearranged and summarized, the errors claimed are:

1. Overruling of motion of each defendant for acquittal.

2. Failure to give defendants' requested instruction as to application of section 6 of the Norris-LaGuardia Act.

3. Refusal to give requested instructions concerning difference between Anti-Racketeering Act and Taft-Hartley Act.

4. Overruling of defendants' contention that the Anti-Racketeering Act is invalid for the reason that the extortion definition is too indefinite.

5. Overruling of defendants' various motions for transfer and continuance.

6. Improper admission of Government's evidence.

7. Wrongful exclusion of defendants' evidence.

8. Refusal to give requested instructions and error in instructions given.

9. Overruling motions for a new trial based on unauthorized communications between a deputy marshal and jurors.

We shall first consider defendants' contention that their motions for judgment of acquittal made at the close of the evidence should have been sustained.

We have recently considered many of the problems arising under the Hobbs Act. *Hulahan* v. *United States,* 8 Cir., 214 F. 2d 441; *Bianchi* v. *United States,* 8 Cir., 219 F. 2d 182, cert. den. April 26, 1955. In the cases just cited we have answered many of the contentions raised by the defendants on these appeals. There is ample evidence in the

record to support a finding that commerce was obstructed and affected. In the *Bianchi* case we rejected the defendants' contention that the Taft-Hartley Act modified the Hobbs Act so as to make the later Act inapplicable to labor representatives. In the *Bianchi* case we also held that "fear" as used in the extortion definition of the Hobbs Act would include fear of economic loss.

The defendants urge that they are entitled to an acquittal because the record shows no previous labor trouble attributable to the defendants upon which Burden could base his claim of fear. As to this, the Government in its brief states:

"* * * There are two answers to this. The first is one which we believe it is of the highest importance to mention early in the discussion of this case. That is, that ultimately the issue in these cases is not so much the cause of the victim's fear, as it is whether or not defendants played upon that fear, in other words, made use of that fear to extort money or property. The Act with which we are concerned *18 U.S.C. 1951*, commonly known as the Hobbs Act, defines extortion as 'the wrongful use of force, violence or fear.' The issues determinative of guilt are whether the victim was fearful, whether that fear was reasonable, and whether the defendants made use of that fear."

The Government's contention appears to be sound. Extortion is defined by Title 18, section 1951(b) (2), as follows:

"The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear * * *."

In the *Bianchi* case we held that the word "wrongful", as used in the foregoing definition, means an illegal act, that is an act which violates the criminal laws of the United States or any State or Territory. In *Nick* v. *United States*, 8 Cir., 122 F. 2d 660, we said (p. 671):

"* * * The gist of the unlawful act is extortion. Extortion involves a state of mind as an element of an offense under the Act. Unless there is some form of compulsion (either physical or fear) there is no crime under this Act. * * * It was, therefore, essential to show that such payment was under such compulsion. The existence of this compulsion might be proved in several ways but one proper way is to show the state of mind under which the committee acted. * * *"

In *United States* v. *Sutter*, 7 Cir., 160 F. 2d 754, Judge Minton, now Justice Minton, quotes with approval the following definition of extortion (p. 756):

"Extortion is defined by Webster as the '* * * act or practice of taking or obtaining anything from a person by illegal use of fear, whether by force, threats, or any other undue exercise of power * * *.' Webster's New International Dictionary, Second Edition, Unabridged (1942)."

In *United States* v. *Compagna*, 2 Cir., 146 F. 2d 524, in discussing the admissibility of evidence to show the fear in the minds of the victims, the court, although finding that no direct threats of violence were made and that there was no evidence that any of the defendants had been involved in previous strikes, goes on to hold that in any event the admission of evidence of the victims' fears was not prejudicial, saying (p. 529):

"* * * The victims' fears originated from acquaintance with the general disorders and violence which had accompanied other strikes. As such, it was part of what everybody knows, and I cannot see how it could have prejudiced the accused with the jury. Indeed it was entirely proper for the jury to infer that the accused expected to play upon precisely such fears, when Bioff threatened to call strikes."

It appears to us that the offense of extortion under the Hobbs Act has been committed if the defendants have il-

legally created fear in their victim, which fear has induced the victim to part with his money or property. If the fear is created in the victim for the purpose of extorting money or property, the offense is present whether the defendants are responsible for any past difficulties in the way of prior illegal strikes or unfair labor practices which may have created the fear, or whether the fear may have been created by what might have happened to others in similar cases. As above stated, in the *Compagna* case, there is no indication that the fear complained of was created by any illegal action of the defendants prior to the extortion. We approved the language hereinabove quoted from the *Compagna* case in the *Bianchi* case. The Anti-Racketeering Act does not curtail any legitimate labor activities. The court on this issue properly instructed the jury as follows:

"The anti-racketeering statute under which the charges are based has no reference or bearing on action by a labor organization leader, honestly acting and representing members of his organization. It has reference to and bears on interference with interstate commerce by the compulsory payment of money extorted by a labor leader for his own individual enrichment. The act clearly is protective to labor organizations, and labor members, and their membership, as it is to employers."

If fear was created in the victim's mind, if such fear was a reasonable one, and if the defendants by making use of that fear extorted money or property, the foundation for guilt is established. In the *Bianchi* and *Hulahan* cases there were express threats that if the money was not paid labor difficulties would follow. In this case we find no evidence of a direct threat. Burden's testimony is that he was invited to lunch by Callanan, which invitation he accepted, and that at such private luncheon at which no others were present the following conversation was had:

"I related to Callanan that we had sustained terrific losses on the Platte line. * * * And that something drastic

had to be done, if we were going to complete the other [Sinclair] line without greater loss. * * * And I told him that the stewards would have to be working stewards, and that just a whole lot more progress would have to be made. That there had been so much trouble up there, that we were fearful of two or three things: First, loss financially; second was danger to our men; third, damage to our property. I told Callanan that this would all have to be changed.

"Callanan asked me then how much money we had in this, how much—would I estimate we were going to make on this job. I told Callanan that that would be hard to answer, so many things depends on something like that, and he said, 'Well would there be a cent a foot in that' for their press. I told him that according to the—although I did not have a full knowledge of the exact footage in the line, that I estimated it would be something like 28 to maybe 29 thousand dollars at a cent a foot and this amount of footage. Callanan then said, 'How about $29,000?' I told him that was * * * high, steep, too much. I then told him that we would pay $28,000 and if the job was good enough and there was enough profit, I would add a thousand to that, after the job was completed with profit.

"I then asked him if the other crafts would share proportionately. Callanan said they would not be the same, because he thought that the welders had the greater part of the job, and that on the work that we had done for the Platte, they had not interfered or handicapped us, as had the other crafts. He didn't tell me at that time just what the proportion was to be.

"I then told Callanan that . . . he would have to render invoices to cover these amounts. Then he asked me if it would be all right for those invoices to read 'Materials and Equipment.' I told him this would be satisfactory, but must have an invoice.

"I further told Callanan that this payment would not be made until after substantial portions of the work was done, so that we were paid for some of the work. And the last payment would be made after all the work was done completely. And he said this satisfactory.

"We talked about the job then, in general, and I again stressed the point that we had suffered these losses; and we then finished our lunch and went back to the original meeting."

Callanan as a witness denied ever having any private conversation with Burden at the luncheon or elsewhere, and denied ever having the conversation related by Burden. In the *Hulahan* case, *supra,* at p. 442 we stated:

"It is elementary that in reviewing the question of the adequacy of the evidentiary basis for a verdict of guilty, this Court must take that view of the evidence which is most favorable to the Government and give to the Government the benefit of all inferences which reasonably can be drawn from such evidence. * * * This is saying no more than that a jury verdict, whether factually right or wrong, is conclusive upon this Court if sustained by substantial evidence or by permissible inference drawn therefrom. * * *"

The jury was warranted in accepting Burden's version of the conversation. There also was evidence in the record to the effect that the defendants were the labor representatives in the territory where Burden was operating. We believe that it was possible and proper in the light of all the evidence for the jury to infer Burden feared that if the tribute demanded was not paid reprisals would be taken and labor difficulties designed to harass the employer and not to accomplish legitimate labor objectives would follow, and that fear on the part of Burden was reasonable and justifiable, and that because of such fear the money was paid. There is in the record ample evidence from which the jury could find that the tribute of $28,000 was paid,

and that a share of the proceeds reached each of the defendants. The payments were made through invoices for rental of equipment never furnished and for supplies never furnished, and were paid by Burden at the direction of the various defendants.

Defendants urge that the failure of the court to give their requested instruction as to the applicability of section 6 of the Norris-LaGuardia Act, 29 U.S.C., § 106, was error. As to the extortion itself there is evidence which would warrant the jury in finding that what was done by Callanan was authorized and ratified by his co-defendants. There is evidence that each received his agreed portion of the money paid. As to such matter, each defendant was acting in his individual capacity and not as a representative of his union. We held in the *Bianchi* case under such circumstances there was no error in refusing to give the requested instruction.

In this case considerable evidence was offered in an attempt to show that the defendants were responsible for past illegal labor activities in connection with the Burden contract for the prior year. Burden summarizes his complaints as follows:

"We wanted the stewards to work; we wanted a better brand of weldings; we wanted more work per day, per man. Those were the three most important points."

Defendants strenuously contend that they were not shown to have been guilty of unlawful acts on the Burden job of the prior year. We agree with this contention. Section 6 of the Norris-LaGuardia Act, 29 U.S.C., § 106, provides:

"No officer or member of any association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the *unlawful* acts of individual officers, members, or agents, except upon clear proof of actual participation in or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." (Emphasis supplied.)

We have heretofore found that no unlawful acts in connection with the prior contract have been proven. Consequently, it would seem that the Norris-LaGuardia Act does not apply. Defendants in their reply brief state:

"The only theory under which the failure to give the Norris-LaGuardia instruction can be condoned is the broad interpretation given at the outset of the Government's brief. Unless that theory be adopted by this Court it must reverse."

We have upheld the Government's broad interpretation of the Act. The issue of the necessity of giving the Norris-LaGuardia instruction because of the evidence of prior labor difficulties presents a rather close question. We do not believe the court committed error in refusing to give the requested instruction. In any event, we are convinced under the record that no prejudicial error has been shown. See *United States* v. *Compagna, supra,* at p. 529.

The record in this case on the issue of failure to give requested instructions concerning the difference between the Anti-Racketeering Act and the Taft-Hartley Act is similar to that in the *Bianchi* case, and for the reasons stated in the *Bianchi* case at p. 192, we hold that this assignment of error is without merit.

We hold defendants' contention that the Anti-Racketeering Act is invalid for the reason that the extortion definition is too indefinite is not established for the reasons assigned for rejecting an identical contention in the *Bianchi* case at p. 196.

The defendants made various motions for transfer and continuance including such a motion made immediately before the trial commenced. The record in support of such motions is very extensive, and is similar to that made in the *Bianchi* case, *supra,* except here one grand jury report was filed six days prior to the commencement of the trial. This grand jury report contains no specific reference to

this case nor are the defendants herein specifically named. The defendants contend that such grand jury reports are unauthorized by law, and to support their contention cite section 6 (e), Federal Rules of Criminal Procedure, and *Application of United Electrical Radio and Machine Workers,* S.D. N.Y., 1 11 Fed. Supp. 858. We are not here directly confronted with the issue of the propriety of such reports. We are primarily concerned with the effect of the wide publicity given this and similar cases on defendants' ability to obtain a fair trial jury. Rule 21(a) of the Federal Rules of Criminal Procedure provides for a transfer on motion of defendant to another district or division when the court is satisfied that there exists so great a prejudice that the defendant can not have a fair and impartial trial in his own district. We have uniformly held that in the determination of questions of transfer and continuance the trial court is vested with a wide discretion. *Finnegan* v. *United States,* 8 Cir., 204 F. 2d 105; *Bianchi* v. *United States, supra.* In this case the trial court carefully examined the prospective jurors and asked the jurors all questions submitted by defendants' counsel and carefully cautioned the jurors to disregard all extraneous matters. We can not say under this record that the trial court abused its discretion in denying the motions for transfer and continuance.

Many errors in the admission of evidence are urged. Some of these relate to the Blackwell incident. Several months prior to the Callanan-Burden conversation, Blackwell, a Burden employee, was beat up by some workmen who were unable to get immediate employment. There was evidence that these men had been sent by Thompson, and that Thompson after the assault came over and prevailed upon Blackwell to withdraw charges Blackwell had filed against his assaulters. The evidence also shows that this incident was reported to Burden and caused him concern. This evidence was admissible as bearing on the reasonableness of Burden's fears. *Bianchi* v. *United States, su-*

pra; Compagna v. *United States, supra.* The court limited the consideration of this testimony as follows:

"This evidence of this character was received solely, if at all, for the purpose of showing the state of mind, whether or not the witness O. R. Burden agreed to pay, first, $28,000.00, and did pay it under fear of economic loss and under fear of injury to his men, and under fear of injury to his equipment. It is not to be received or understood by you as any proof of the truth of the charges, but what effect, if any, did the conveyance of this information, whether true or not, to O. R. Burden, have on his mind?"

Objection was also made to Blackwell's testimony as to the contents of letters from Thompson given him by assaulting employees, the substance of the letters being that the bearers were to be given the best jobs available. There was no abuse of discretion in the court's determination that a proper foundation had been laid for the secondary evidence. In any event, any error would appear to be without prejudice in the light of the evidence that Thompson came down immediately after the assault and intervened in behalf of the assaulters.

Objection was also made to testimony that stewards were appointed by Thompson and Poster, that there were too many workers, that they were lazy and inept, and that the stewards did not work. There was independent evidence that the defendants were the representatives of the various crafts working on the Burden projects. Burden in his conversation with Callanan made complaints about the excess number of workers, the quality of the work, and the fact that the stewards did no work. The defendants through Callanan had full knowledge of Burden's complaints. We do not believe that any of this evidence goes to the extent of establishing that any illegal or unfair labor practices existed prior to the alleged extortion demands. Since Burden's complaints as to past labor difficulties were summarized in his conversation with Callanan, the addi-

tional cumulative evidence as to past labor practices, even if wrongfully admitted, would not constitute prejudicial error. *Finnegan* v. *United States, supra,* at p. 112.

Callanan denied any connection with the R & A Welding Supply Company and the Pipe Line Welding Supply Company. Burden had testified that Callanan received his share of money through fictitious invoices of such companies. On rebuttal contractor Potaschnick testified that he had paid off Callanan at Callanan's direction through fictitious invoices of the same companies. This testimony was relevant and competent rebuttal testimony for the purpose for which it was introduced. In *Glasser* v. *United States,* 315 U.S. 60, the Court said (p. 81):

"* * * Trial judges have a measure of discretion in allowing testimony which discloses the purpose, knowledge, or design of a particular person. * * *"

In *Brickey* v. *United States,* 8 Cir., 123 F. 2d 341, this court said (p. 344):

"The general rule is that a crime can not be established by evidence of other distinct crimes not charged in the indictment. But where intent and knowledge are essential elements of the offense charged, evidence of transactions so connected with the specific offense charged that it tends to show criminal intent or guilty knowledge is admissible. * * *"

In its instructions the court limited the Potaschnick testimony to the defendant Callanan on the substantive offense, saying:

"* * * for the purpose, if you find it does, to show knowledge or intent of defendant Callanan as to the names which appear at the head of the invoices received by the witness Potaschnick and the Burden Construction Company, being the same, and the disposition of funds paid to the two named Companies by the Burden Company, as indicated by Government's Exhibits 18 and 19."

There was no abuse of discretion in admitting Potaschnick's evidence as limited by the instruction.

Defendants claim error in the rejection of their offered testimony, and that the court improperly restricted their cross examination as to the contractor's national agreement, as to alleged tax deficiency claims against Burden, and as to various liquor purchases by Burden purported to be for inspectors, and that the court also erred in excluding testimony as to detailed bids of all contractors on the pipe line projects and a letter written by a pipe line company official to Burden analyzing Burden's loss on the pipe line project. These all pertain to collateral matters, and no abuse of discretion on the part of the court in rejecting this evidence is apparent.

The defendants likewise objected to the court's sustaining the Government's objection to the following question:

"Mr. Burden, at the time that you were making the arrangements to pay the $28,000, and at the time that you made the payments, you knew, did you not, sir, that in making those payments under the provisions of the Taft-Hartley Law that you would be guilty of the commission of a crime?"

The question obviously was improper in form in that it assumed facts not established by the evidence, and the objection to the question was properly sustained.

Numerous objections were made as to instructions given and failure to instruct. This case was tried by Judge Hulen who also tried the *Bianchi* case. It would unduly extend the length of this opinion to set out the instructions, exceptions thereto, and the requested instructions. For the most part the instructions given here are similar to those given in the *Bianchi* case, and the objections lodged to the instructions, and failure to instruct appear to raise the same issues. We have answered the defendants' objections

to the instructions sufficiently by what we have said in the *Bianchi* case.

An additional objection is made here that the court's instructions were argumentative and incorporated an unfair comment upon the evidence. Under federal procedure the trial judge is more than an umpire. In *Buchanan* v. *United States,* 8 Cir., 15 F. 2d 496, 498, the following guide is set out for determining questions such as we have here:

"* * * Under the rule, as stated and applied by the Supreme Court, it seems that, when a judge expresses his opinion as to the facts to the jury, making it clear that it is nothing but his opinion, and not binding upon them in any way, and that it is their duty and responsibility to determine all of the facts, he is within his rights, and that he is only subject to reversal when his comments upon the evidence or opinion as to the facts amount to partisan argument or advocacy, or constitute an appeal to passion or prejudice. It is unquestionably true that, because of the judge's influence with the jury, the right which he has to express his opinion as to the facts should be sparingly, carefully, and wisely used. At the same time, because of his participation in the actual trial of the cause, he is better able to tell when the use of that right is justified than is an appellate court from reading the cold record. After all, jurors are men with minds of their own, and, where they are given to understand that the responsibility for determining the facts is upon them, they do not generally act against what they believe to be right and just. * * *"

See also *Myres* v. *United States,* 8 Cir., 174 F. 2d 329, 337; *McCoy* v. *Blakely,* 8 Cir., 217 F. 2d 227, 233.

In the present case the court fully advised the jury that it was the jury's province to determine all disputed fact issues and that the jury was not bound by any expression of opinion by the court. We have carefully read and considered the instructions as a whole, and find that they are

not vulnerable to the objection that the court's comments amount to partisan argument or advocacy.

Finally, it urged that the court erred in overruling defendants' motion for a new trial based on misconduct in connection with jury deliberations and in unduly restricting cross examination of jurors. An affidavit was filed that Mrs. Naeger, one of the jurors, told a Mrs. Kruger that while the jury was being taken to dinner during deliberations a deputy marshal, in reply to a juror's remark that it looked like a hung jury, stated that there could not be a hung jury in federal court and that jurors would be confined until they reached a decision. The court held a hearing on this issue, affording all interested persons an opportunity to be present. All jurors except one out of the State were examined and all including Mrs. Naeger denied hearing the alleged hung jury statement. In *Remmer* v. *United States,* 347 U.S. 227, the Court held that a public hearing must be had to investigate any complaint of an unauthorized communication with a juror. The Court states the rule as to communications to be (p. 229):

"In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. *Mattox* v. *United States,* 146 U.S. 140, 148-150; *Wheaton* v. *United States,* 133 F. 2d 522, 527."

The only competent evidence at the hearing was evidence pertaining to extraneous interference with a jury verdict. In *Wheaton* v. *United States,* 8 Cir., 133 F. 2d 522, this court said (p. 526):

"The issues raised by the motion for a new trial were:

(1) What communications were made to the jury by the bailiff? (2) Were they prejudicial or harmless? These issues were to be determined by the trial court from competent evidence. In so far as the affidavit of any juror attempted to impeach the verdict of the jury, or related to a matter resting in his personal consciousness or to the motives or influences which affected the jury's deliberations, the affidavit was incompetent, and it was only competent to indicate the existence of extraneous interference with the jury's deliberations. * * *"

See also *Mattox* v. *United States*, 146 U.S. 140. The court held a fair hearing. It permitted full exploration of any communications between the jurors and outsiders. At the conclusion of the hearing the court made the following finding:

"Under this record we find: (1) that the only communication made to the jury during deliberation was that in the event of a hung jury those defendants on bond would be continued on bond; that the communication by the lady Deputy Marshal was without substance; (2) that the remarks or statements of neither Deputy Marshal, standing alone or coupled with the questions to which they replied, were prejudicial to either of the defendants; (3) that there is no competent evidence to sustain the allegations of paragraph 86 of the motion for new trial; (4) that the affidavit, as well as testimony, offered to impeach the juror Naeger is incompetent."

The court did not commit any error in conducting the hearing on the issue of communication with outsiders, and we believe its findings, hereinabove set out, are fully supported by the record. We find no merit in this assignment of error.

We have carefully considered the entire record and all errors urged by the defendants. We find that no reversible error has been shown. The defendants have had a fair trial.

The judgments and sentences are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

October Term, 1954

No. 322

Argued May 11, 1955 Decided July 1, 1955

Docket No. 23546

UNITED STATES OF AMERICA, *Appellee*,

v.

JOSEPH P. RYAN, *Defendant-Appellant*.

Before: L. HAND, SWAN and FRANK, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, entered by Judge Palmieri, after a trial without a jury. REVERSED.

J. Edward Lumbard (Arnold Bauman, George H. Bailey, of counsel) for appellee

Waldman & Waldman (Louis Waldman, Seymour M. Waldman and Martin Markson, of counsel) for appellant

Defendant-Appellant, Joseph P. Ryan, President of the International Longshoreman's Association (hereinafter called ILA) was indicted, under 29 U.S.C. Section 186(b) and (d)—61 Stat. 302(b) and (d)—on three counts, in that, on three separate occasions, he unlawfully, wilfully and knowingly received sums in the aggregate of $2,500, from corporations employing members of the ILA. With the consent of defendant, the case was tried without a jury. There was evidence that, on three occasions during 1950 and 1951, when defendant was president of the ILA and its Atlantic Coast District, he was visited by James C.

Kennedy, president of Daniels & Kennedy, Inc. and of J. Arthur Kennedy & Son, Inc., and was given envelopes containing money. There was also evidence that the two corporations headed by Kennedy employed longshoremen who were members of the ILA. The trial judge found that the defendant knew he was receiving money, knew that he was receiving it from one who employed workers represented by the union of which he was president, and knew he was receiving it because he was a union official. The judge, holding defendant guilty on all counts, sentenced him to imprisonment for six months on each count (the sentences to run concurrently) and fined him $2,500. Defendant has appealed.

61 Stat. 136-162. The Labor Management Relations Act (the so-called Taft-Hartley Act) was enacted in 1947. Section 101 of that Act amended the National Labor Relations Act originally enacted in 1935. Section 2 of the National Labor Relations Act, as thus amended, reads in part as follows: "When used in this Act . . . (4) The term 'representatives' includes any individual or labor organization." (61 Stat. 137).[1]

Section 501 of the 1947 Act (61 Stat. 161) reads in part as follows: "When used in this Act . . . (3) The terms 'commerce,' 'labor disputes,' 'employer,' 'employee,' 'labor organization,' '*representatives,*' 'person,' and 'supervisor' shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.[2]

Section 302 of the 1947 Act (61 Stat. 157-158) reads as follows:

"*Restrictions on Payments to employee representatives.*

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[1] In fact, this provision continued unchanged the definition of "representatives" contained in the N.L.R.A. before its amendment in 1947.

[2] Emphasis added.

"(a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

"(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

"(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance or dispute in the absence of fraud, or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, that the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, fam-

ilies and dependents jointly with the employees of other employers making similar payments and their families and dependents): *Provided*, that (A) such payments are held in trust for the purpose of paying, either from principal or income or both for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) The detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held

therein cannot be used for any purpose other than paying such pensions or annuities.

"(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

"(e) The District Courts of the United States and the United States Courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of Section 17 (relating to notice to opposite party) of the Act entitled 'an Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U.S.C., title 28, sec. 381), to restrain violations of this section, without regard to the provisions of section 6 and 20 of such Act of October 15, 1914, as amended (U.S.C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled 'An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,' approved March 23, 1932 (U.S.C., title 29, secs. 101-115).

"(f) This section shall not apply to any contract in force on the date of enactment of this act, until the expiration of such contract, or until July 1, 1948, whichever occurs first.

"(g) Compliance with the restrictions contained in subsection (c)(5)(B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits."[3]

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[3] The references to the National Labor Relations Act are clearer in 61 Stat. 136-162 than in 29 U.S.C.

FRANK, *Circuit Judge:*

1. Defendant correctly asserts that there was no evidence of extortion (or the like). Accordingly, he argues thus: Previous to the enactment of Section 302(b), extortion had already been covered by the so-called Anti-Racketeering Act, 18 U.S.C. 1951; section 302(b) should not be construed to include the receipt of money or property, absent extortion, since then it would be, or come close to being, void for vagueness, and a court should, if possible, avoid an interpretation of a statute that would make it void or put it on the edge of the unconstitutional.

Defendant also argues that Section 302(b) should not be construed to include representatives of unions because then it would overlap state statutes. Here defendant cites *Jerome* v. *United States,* 318 U.S. 101, 104-105, where the court said: "Since there is no common law offense against the United States . . ., the administration of criminal justice under our federal system has rested with the states, except as criminal offenses have been explicitly prescribed by Congress. We should be mindful of that tradition in determining the scope of federal statutes defining offenses which duplicate or build upon state law. In that connection, it should be noted that the double-jeopardy provision of the Fifth Amendment does not stand as a bar to federal prosecution though a state conviction has already been obtained . . . . That consideration gives additional weight to the view that where Congress is creating offenses which duplicate or build upon state law, courts should be reluctant to extend the deferred offenses beyond the clear requirements of the statute."

We have not found it necessary to consider either of those contentions, since we rest our decision on another ground.

3. Defendant's principal argument is that he was not a "representative of any employees" within the meaning of Section 302(b). His reasoning is as follows:

Section 501(3) provides that "when used in this Act, the term 'representative' is to have the same meaning as when used in the National Labor Relations Act as amended by this Act. Section 2 of the National Labor Relations Act, as thus amended, provides that, when used in that amended Act, the "term 'representative' includes any individual or labor organization."

Throughout the NLRA, as thus amended, "representative" is used, with reference to a representative of employees, as a word of art, to mean solely a labor organization or an individual (or individuals) designated by a majority of the employees, in an appropriate unit, as their exclusive bargaining representative.

This interpretation of "representative" in Sec. 302(b) is in complete accord with the primary purpose of Congress in enacting Sec. 302 as an entirety, i.e., to render unlawful the creation of union welfare funds unless restricted as provided in Sec. 302(c)(5).

In the case at bar, a union, ILA, was the exclusive Bargaining representative. Consequently, here Sec. 302(b) could apply to the union only, not to defendant who was but a representative of the representative, i.e., of the union.

Accordingly, defendant did not violate Subsection 302(b).

The government, on the other hand, contends that "representative" in Subsection 302(b) must be given its everyday, commonplace meaning; that, therefore, it includes a representative of a union; and that defendant comes within that definition. If subsection 302(b) stood alone, that contention would be highly persuasive.[4]

[4] If, however, we accepted that interpretation, we would have to consider defendant's argument noted in point I of this opinion.

That subsection, however, is not an island but part of a statutory continent. To understand the words "representative of any employees" in subsection (b) of Section 302, we must look to Section (3) which instructs us that "representative" in Section 302(b) has the same meaning "as when used in the amended National Labor Relations Act." In Section 2(4) of that Act, we find the "term 'representative' includes any individual or labor organization." We thereby learn what "representative" includes. To understand what it means, with reference to a representative of any employees," we must heed Section 501(3) and turn to the many sections of the amended NLRA where "representative" is so used.[5] We discover that there invariably it means a "representative" selected by a majority of the employees, in an appropriate unit, as their exclusive bargaining representative. (Only once is it used otherwise, i.e., in Section 2(1) where, defining "person," the Act includes a "legal representative".) The question then arises whether an "individual" can be an exclusive bargaining representative. Clearly he can. The Labor Board has so interpreted the Act.[6]

We see nothing in the exception clauses of Section 302(c) at all at odds with defendant's contention: Clauses (2), (4) and (5) obviously are not. Clauses (1) and (3) apply to an individual employee who is also an exclusive bargaining agent—and thus himself a "representative." We think it significant that when, in the 1947 Act, Congress wanted to refer to individuals acting for a union, it spoke of them not as "representatives" of a "labor organization," but as "agents" of such an organization; see Sec-

[5] See Sections 1, 2, 7, 8(a)(3), 8(a)(5), 8(b), 8(b)(4), 8(d), 9(a), 9(b), 9(c)(1) and 9(g).

[6] See The Robinson-Ransbottom Pottery Company, 27 NLRB 1093 (1940); The Louisville Sanitary Wiper Company, Inc., 65 NLRB 88 (1945). These cases arose under the NLRA before its amendment in 1947; but that amendment did not change the statutory definition of "representatives."

tion 8(b)—61 Stat. 141—of the amended N.L.R.A., a subsection added by the 1947 Act.

The government argues that, in every instance where "representative" is used in the amended N.L.R.A. to designate a "representative" of employees, the word is qualified by the word "bargaining" or by the phrase "subject to Section 9(a)." That is not true: Section 8(b)(4)(B) and Section 8(d)—61 Stat. 141-142—use the words "representative of his employees" or "representative of the employees" without any qualification, and Section 1 (61 Stat. 137) and Section 7 (61 Stat. 140) speak of "representatives of their own choosing."

The following further suggestion is advanced: (1) As defined in Section 2(5) of the N.L.R.A.,[6a] "labor organization" can be interpreted to cover not only an exclusive bargaining agent but also either any group or any individual whatever to whom any employees give authority to deal with their employer concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." (2) Accordingly, since Section 2(4) provides that "representatives" include "any individual or labor organization," an individual who is not an exclusive bargaining agent can be a "representative."

We reject that suggestion for these reasons: (1) It involves a straining of the language of Section 2(5) to have the term "labor organization," which normally imports a collective body or group, cover an individual. (2) More important, if "labor organization" includes an individual, then Section 2(4) uses the word "individual" redundantly when it says that "representatives" include "any

[6a] This subsection reads as follows: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

individual or labor organization." For the suggested interpretation of Section 2(4) would cause it to read, in effect, thus: "The term 'representatives' include (a) an individual or (b) an individual or a group having authority from any employees to deal with their employer."

3. The government makes much of the legislative history. But, so far as it illuminates, it tends strongly to support defendant's contention. This appears from the following:

A fore-runner of the 1947 Act was the so-called Case Bill, H.R. 4908, reported on the floor of the House of Representatives on January 28, 1946 (92 Cong. Rec. 490). After this bill passed the House, on February 7, 1947 (Cong. Rec. 1069, 1118), the Senate Committee reported it on April 15, 1946. On May 16, 1946, Senator Byrd submitted an amendment (92 Cong. Rec. 4809) entitled "Restrictions on Payments to Labor Organizations." This Byrd amendment (except for the definition of "representative" noted infra) is substantially the same as the present Section 302. The Case Bill, including the Byrd amendment, was passed by Congress but was vetoed by the President, and Congress failed to over-rule the veto.

One year later, as part of the comprehensive labor bill then under consideration, an amendment similar to the Byrd amendment was introduced in the House but failed of passage. The Senate Labor Committee reported out the comprehensive labor bill without any such amendment. However, five members of that Committee, including Senators Taft and Ball, filed a Supplemental Report (to the Committee's report) in which they urged an amendment quite like the Byrd amendment of the previous year. On May 7, 1947, Senator Ball, for himself and three other Senators, introduced the amendment on the Senate Floor (93 Cong. Rec. 4667), and it was adopted as Section 302 of the Senate Bill.

Like the Byrd amendment, Section 302, as adopted by the Senate, included the following subsection (g):

> "For the purposes of this section, the term 'representative' means any labor organization which, or any individual who, is authorized or purports to be authorized to deal with an employer, on behalf of two or more of his employees, concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work; and for the purposes of section 301 includes any other organization or fund of which some of the officers are representatives or are members of a labor organization or are elected or appointed by a representative."

This definition was susceptible of the interpretation that "representative" included a union official. Senator Ball, explaining that paragraph, (g), said (93 Cong. Rec. 4678): "Subsection (g) is simply a definition of the term 'representative' as used in the section, which is required to be somewhat different from the definition of 'representative' in the National Labor Relations Act."

But the Joint Conference Committee, which ironed out the differences between the House and Senate bills, significantly omitted that definition and, instead, added the word "representative" to the list of terms defined by Section 501(3) as having the same meaning as when used in the amended N.L.R.A. In this form, the bill passed both houses of Congress and was enacted over a Presidential veto.

Before the Joint Conference Committee made that change, Senator Ives, in debate, had said: ". . . I . . . should like to point to section (b) . . . I wish to inquire whether that could be construed in any way as affecting Christmas presents or birthday presents or anything of that type. The language is rather broad, and it appears to me to be vague." (93 Cong. Rec. 4748). Senator Ives later was a

Senate member of the Joint Conference Committee which made the change.

Most of the Congressional debates and Committee reports concerning Section 302, and concerning the Byrd amendment in the previous Congress, were devoted to the subject of the regulation of union welfare funds. They show that this section was prompted by the demand of the United Mine Workers Union for an employer contribution to a welfare fund of 10¢ per ton of coal, a fund administered by the union alone with no restrictions on its discretion.[7] The following statements from the debates on the Ball amendment are illustrative:

(Senator Ball): "Mr. President, the pending amendment deals with so-called welfare funds, which are becoming increasingly prominent in negotiations between unions and employers. . . . Mr. President, the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds. . ." (93 Cong. Rec. 4678).

(Senator Byrd): "It [the amendment] has a specific purpose, which is to prohibit the labor unions from requiring welfare funds to be paid into the treasuries of the labor unions." (93 Cong. Rec. 4678).

(Sentor Taft): "The occasion of the amendment was the demand by the United Mine Workers of America that a tax of 10¢ a ton be levied on all coal mined, and that the tax levied be paid into a general welfare fund to be administered by the union for practically any purpose the union considered to come within the term 'welfare.' . . . The purpose of the amendment is to require that the fund shall be established in definite detailed form. . . . The purpose is to prevent the abuse of welfare funds. . . . This amendment is, in effect, a provision to prevent the abuse of

[7] Also discussed was a limitation on check-offs to labor organizations.

the right to establish such funds by collective bargaining. . . ." (93 Cong. Rec. 4746-47).

Sen. Rep. 105 on S. 1126, Supplemental Views, p. 52 (Senators Taft, Ball, Donnell, Jenner, H. Alexander Smith): "Limitation on Abuse of Welfare Funds. . . . The necessity for the amendment was made clear by the demand made last year on the part of the United Mine workers. . . ."

The government points to a few isolated expressions in the Supplemental Report in 1946, and during the debates in 1946 and 1947,[8] indicating that Section 302(b) may have been intended (1) to apply to union representatives and (2) to cover extortion.[9] Those relative to "extortion" can be read as characterizing such demands on employers as those made by the United Mine Workers for the establishment of unregulated union trust funds. Thus when Senator Taft (93 Cong. Rec. 4746) mentioned "a case of extortion or a case where the union representative is shaking down the employer," the context suggests that he had in mind the alleged practice of some unions of bargaining for their own benefit rather than for the benefit of the employees they represented. These unions would exert marked pressure to gain employer contributions to an uncontrolled fund; it was said that such funds would then be used as union "slush" or strike funds. The grant of such employer contributions, it was urged, would be accepted by the union as the price of a collective bargaining agreement in lieu of other benefits which the workers should have received. This fear was expressed by Senator Ball, in introducing his amendment, as follows:

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[8] Many of them emanated from Senators or witnesses interested in defeating Section 302.

[9] The Supplemental Report (1946) said: "The amendment makes extortion illegal."

Senator Taft in 1947 (93 Cong. Rec. 4746) spoke of "a case of extortion or a case where the union representative is shaking down the employer."

"Mr. President, the sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contribute to them and that they shall not degenerate into bribes. . . . I have heard of many cases in which unions have even relinquished wage demands in order to secure a welfare fund with a percentage of the payroll paid into the welfare fund established, and employers have frequently agreed to that procedure." (93 Cong. Rec. 4678 (1947)).

In any event, the significant fact is that all those expressions occurred before the Joint Conference Committee had deleted paragraph (g) of Section 302 (above quoted) separately defining "representatives," and had substituted the definition now contained in Section 501.[10]

Since defendant was not a "representative" within Section 302(b) as we interpret it, we reverse with directions to dismiss on the merits.

Reversed.

HAND, Circuit Judge (dissenting).

As my brothers say, § 142(3) of Chapter 49, U. S. Code, which is part of Subchapter I of the "Labor-Management Relations Act, 1947," defines the term, "representative," by reference to its use in Subchapter II—the National Labor Relations Act. It also defines "labor organizations" in the same way. Although the word, "representative," is

[10] The Joint Conference Committee reported that Section 302 of the Senate bill "was adopted with minor clarifying changes." We see no conflict between the significance we have attached to the changes made by that Committee and the report's description of those changes as "minor." For, in relation to the general purpose of the section—the regulation of union welfare funds—the changes are of little import, and only if the Section is applied to other kinds of payments do they assume importance.

repeatedly used in Subchapter II, I can find no definition of it anywhere except that § 152(4) says that it includes "any individual or labor organization"; from which it follows that the Act understands that "representatives" of employees may be other than a "labor organization." Section 152(5) defines a "labor organization" as "any organization of any kind" (which I take to require a group of individuals) "or any agency or employee representation committee or plan in which employees participate and which exists for the purpose in whole or in part of dealing with employers, concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." I should suppose that, read as it should be as in contrast to "any organization of any kind," this last language would include an individual to whom employees give authority to deal with their employer. Therefore I cannot see any escape from saying that a single person may be a "labor organization"; and, if so, then there may be "individuals" who are "representatives" of employees and yet who are not authorized to negotiate with employers. Hence, I can see no reason for denying what to me is the natural meaning of "representative," which would cover any official, or at any rate the president, of a union. Of course § 186 might still be confined to payments made into the union treasury, but that must be for other reasons than that they are payments to a "representative." I of course agree that the section does cover payments into the union treasury (subsections (c)(4) and (c)(5) prove that), but the accused must go further, and does; for he argues that the section covers no payments but those made in the course of negotiation and to a bargaining agent of the union for the union. But I start with the premise, that, so far as concerns definitions, there is no reason why we should not understand the word in its ordinary sense; and it is certainly irrelevant that the Act uses it in most instances—for example, in § 158(d)—in a limited sense.

However, I go further, because I find evidence in subsection (c) that it does not exclude union officials, though they are not engaged in bargaining. That subsection is the provision that excepts payments which without it would fall within subsections (a) and (b). Subsections (c)(4) and (c)(5) are indeed confined to payments made to a union, and I think that the same is true of subsection (c)(2), although that is not quite so certain. On the other hand subsections (c)(1) and (c)(3) presuppose that § 186 covers payments into the pocket of a union official for his own use; because, since, as I have just said, the purpose of subsection (c) is to state exceptions to the preceding subsections (a) and (b), the payments that subsection (c) covers would fall within (a) and (b) except for the exception. Hence, subsections (a) and (b) do cover payments not made into the union treasury, but directly to a "representative," who need not himself have any authority whatever to negotiate for the union. The accused answers that these subsections are only to protect those, who may be negotiating for the union, when they take their wages or have an ordinary market transaction with the employer. So far as the "representatives" are only the bargaining agents of a union, that construction makes the subsections only cautionary, and does not answer the objection that, not only are they called exceptions, but they are indiscriminately mixed with indubitable exceptions. On the other hand, if they are treated as true exceptions (as they may be if confined to cases where the individual negotiators are themselves the union) although the formal difficulty is avoided, the occasions on which the subsections would apply are so much reduced that it is most unlikely that Congress would have thought it worth while to provide for them. It must very rarely be true that one or two or three individuals are in fact a "labor organization"; and it is substantially impossible, I submit, that Congress would have deemed the possible accumulation of the union funds of such "labor organizations" an

appreciable evil. For the foregoing reasons I do not think that there is the least textual reason to confine § 186 to payments made to union "representatives" into the union treasury as a result of bargaining negotiations.

As I have said, that was indeed one of the objects of the Act, and it was particularly present in the mind of Congress at the time, for in 1947 the "Mine Workers Union" was attempting to collect a large "war chest." But that does not mean that prevention of such accumulations was the only object of the Act. Moreover, in order to affirm the conviction it is not necessary to suppose that § 186 was directed against the bribery of union officials, although, if I am right, it certainly does cover bribery. (Incidentally, if bribery had been the target, the penalty would almost certainly have been more than a year's imprisonment.) An altogether adequate purpose, and one which does not involve the textual difficulties I have discussed, is that in addition to preventing employers from helping to fill a union's "war chest," Congress wished to prevent employers from tampering with the loyalty of union officials, and disloyal union officials from levying tribute upon employers. The first was the situation at bar, the employer did not bribe the accused; it did what has been done, time out of mind, when one person, knowing that he is likely to have continuous dealing with another, in which the second person will be acting as a fiduciary, wishes to insure a friendly approach to the fiduciary; and makes him presents or does him favors, or in other and less palpable forms tries to turn the edge of his allegiance. Although § 186 deals only with the grosser forms of this evil, it presupposes a more than ordinary fiduciary defection. A union official has a double loyalty: first, he owes it to the members of his union, who have chosen him to represent them; next, he owes it to those employees, who are not members, but in favor of whom the law has nevertheless imposed on him an equal duty. Surely, it was altogether likely that

Congress should wish to put an end to such abuses by both parties—the unions and the employers.

Last is the question of the history of the section's passage through Congress. The principal discussion was indeed about contributions to a union's treasury; and that was true as well of the "Case Bill,"—the predecessor of the Act before us—as of the Act itself. The absence of much discussion about preventing the kind of offence here prosecuted, seems to me not at all surprising; there could have been no opposition to it, except that in fact made: it might cover innocent payments. Besides, the question here at issue did not wholly escape notice. Take, for example, what Senator Taft said about § 186(a): "That is, it may be said, in a case where the union representative is shaking down the employer." Or consider Senator Ives's inquiry whether § 186(b) "could be construed in any way as affecting Christmas presents, birthday presents or anything of that type." Both he and Senator Pepper voted against the bill, presumably because they thought that for this reason it went too far. I do not forget that the section defining "representative," was at that time more specific than § 142(3), which eventually supplanted it in conference; but the amendment makes rather against the accused than in his favor, if we treat subsections (4) and (5) of § 152 as incorporated in § 142(3). For, although the supplanted section did contain the word "individual," as well as "labor organization," it limited it to an "individual" who was, or claimed to be, authorized to deal with an employer; and § 152(4) does not do so, as I have said.

However, even if the debates threw more light than they do on the meaning of the words, I should hesitate to accept them as an authoritative gloss. It is one thing to look for that purpose to the reports of one or both of the Houses of Congress; for it is not unreasonable to believe that those members, who are not content to let the words speak for themselves, may have relied upon the report as

authoritative; and in any event that is well settled law.* On the other hand, although it is true that courts have repeatedly mentioned the debates that attended the passage of a bill as relevant to its interpretation, the decisions are so much at variance that I find it impossible to extract any safe principle. The words of the sponsor of a bill are presumptively entitled to be considered,** although it is impossible to know how far those who voted for it may have acted on the faith of them; but the remarks made in general debate are not to count.***

There does indeed remain the question raised by Senator Ives and Senator Pepper: i.e. whether § 186 forbids a Christmas present to a union official who chances to be a friend, or even a relative, of the employer. To draw lines is always difficult; and the one sure way to miss the meaning of a statute is to read the words out of their context and as you find them in the dictionary. Nearly every statute has its penumbra, and this one is not an exception; but

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* Binns v. United States, 194 U.S. 486, 495.
Lapina v. Williams, 232 U.S. 78, 90.
United States v. St. Paul M. & M. Ry., 247 U.S. 310, 318.
Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474, 475.
Wright v. Vinton Branch, 300 U.S. 440, 463, 464.
Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394, 395.

** United States v. St. Paul M. & M. Ry., supra (247 U.S. 310, 318)
Duplex Printing Press Co. v. Deering, supra (254 U.S. 443, 474, 475).
McCaught v. Hersey, 283 U.S. 488, 493, 494.
United States v. Great Northern Ry., 287 U.S. 144, 154, 155.
Wright v. Vinton Branch, supra (300 U.S. 440, 463, 464).
Schwegmann Brothers v. Calvert Distillers Corp., supra (341 U.S. 384, 394, 395).

*** United States v. Trans-Missouri Freight Association, 166 U.S. 290, 318, 319.
Dunlap v. United States, 173 U.S. 65, 75.
Lapina v. Williams, supra (232 U.S. 78, 90).

it would be most unreasonable to defeat a part of its purpose, because there is no a priori rule for deciding when a payment was purely donative, and when it was actuated by the prospect of possible benefits to come.

As my view is not to prevail, I shall not discuss the other objections that the accused raises, except to say that I have considered them, and that they have not convinced me that any error was committed that would justify a reversal. I would affirm the conviction.

APPENDIX C

(Judgment in Cause No. 15139)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15139

September Term, 1954

Friday, June 3, 1955

LAWRENCE CALLANAN, *Appellant,*

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Eastern District of Missouri

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Lawrence Callanan, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 3, 1955

(Judgment in Cause No. 15140)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15140

September Term, 1954

Friday, June 3, 1955

CARL BIANCHI, *Appellant,*

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Eastern District of Missouri

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Carl Bianchi, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 3, 1955

(Judgment in Cause No. 15141)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15141

September Term, 1954

Friday, June 3, 1955

L. A. THOMPSON, *Appellant,*

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Eastern District of Missouri

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, L. A. Thompson, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 3, 1955

(Judgment in Cause No. 15142)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15142

September Term, 1954

Friday, June 3, 1955

WILLIAM POSTER, *Appellant,*

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Eastern District of Missouri

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, William Poster, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 3, 1955

(Judgment in Cause No. 15143)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 15143

September Term, 1954

Friday, June 3, 1955

R. M. SECOR, *Appellant,*

vs.

UNITED STATES OF AMERICA.

Appeal from the United States District Court for the Eastern District of Missouri

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, R. M. Secor, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

June 3, 1955

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statememt	4
Argument	10
Conclusion	21

CITATIONS

Cases:

Bianchi v. *United States*, 219 F. 2d 182, certiorari denied, 349 U. S. 915	12, 16
Hornstein v. *Paramount Pictures, Inc.*, 292 N. Y. 468	17
Ladner v. *United States*, 168 F. 2d 771	18
Nick v. *United States*, 122 F. 2d 660, certiorari denied, 314 U. S. 687	19
People v. *Barondess*, 133 N. Y. 649	19
People v. *Bernoff*, 292 N. Y. 230	20
People v. *Feld*, 262 App. Div. (N. Y.) 909	17
People v. *Lamm*, 292 N. Y. 224	20
People v. *Rosenzweig*, 265 N. Y. 323	19
United Brotherhood of Carpenters v. *United States*, 330 U. S. 395	14
United States v. *Compagna*, 146 F. 2d 524, certiorari denied, 324 U. S. 867	19
United States v. *Kemble*, 198 F. 2d 889, certiorari denied, 344 U. S. 893	14
United States v. *Local 807*, 315 U. S. 521	20
United States v. *Ryan*, No. 281, October Term, 1955	11

Page

Statutes:
Act of March 23, 1932 (Norris-LaGuardia Act), Sec. 6, 47 Stat. 71, 29 U. S. C. 106--- 3, 12, 14
Anti-Racketeering Act of 1934, 48 Stat. 979----- 19
Labor Management Relations Act (Taft-Hartley), Sec. 302, 61 Stat. 157, 29 U. S. C. 186------- 3
18 U. S. C. 1951, 62 Stat. 793 (the Hobbs Act)- 2–3, 18

Miscellaneous:
91 Cong. Rec. 11843, 11900, 11906, 11908, 11910- 19
H. Rept. No. 238, 79th Cong., 1st sess., p. 10---- 20

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 256

LAWRENCE CALLANAN, CARL BIANCHI, L. A. THOMPSON, WILLIAM POSTER AND R. M. SECOR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a–17a) has not yet been reported. The opinion of the District Court overruling motions for judgment of acquittal or a new trial appears at pages 794–800 of the record.

JURISDICTION

The judgments of the Court of Appeals (Pet. App. 38a–42a) were entered June 3, 1955. A petition for rehearing was denied July 5, 1955.

The petition for a writ of certiorari was filed July 22, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence established extortion by petitioners to obtain money for their personal benefit through use of fear based on their power as labor union officials.

2. Whether it was error to permit the jury to consider evidence as to labor difficulties encountered by the employer on a project completed just before the time that payments on behalf of petitioners were demanded, without any instruction under Section 6 of the Norris-La Guardia Act as to responsibility of union representatives for acts of others.

3. Whether, in a prosecution under the Hobbs Act, it was error for the court to refuse a charge based on Section 302 of the Labor Management Relations Act of 1947, making payments by employers to representatives of employees a misdemeanor.

4. Whether it is extortion within the meaning of the Hobbs Act for labor union representatives to obtain money for their own benefit from one who is induced to pay by fear of economic injury.

STATUTES INVOLVED

18 U. S. C. 1951, 62 Stat. 793 (the Hobbs Act), provides in part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> * * *
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

Section 302 of the Labor Management Relations Act (Taft-Hartley), 61 Stat. 157, 29 U. S. C. 186, provides in part:

> (b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

Section 6 of the Act of March 23, 1932 (Norris-LaGuardia Act), 47 Stat. 71, 28 U. S. C. 106, provides:

> No officer or member of any association or organization, and no association or

organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

STATEMENT

An indictment in two counts returned against petitioners in the United States District Court for the Eastern District of Missouri charged in count 1, conspiracy to commit, and in count 2, the substantive offense of extortion in violation of 18 U. S. C. 1951. It was alleged that beginning in 1951, petitioners, in their purported capacities as labor union representatives, planned to and did embark upon a course of oppressive conduct against O. R. Burden and his construction company, and that, by threats, they extorted $28,000 from O. R. Burden and his construction company through the wrongful use of force and fear (R. 1–9). Petitioners were found guilty as charged (R. 739–740). All of them except Bianchi were given sentences of 12 years on each count, to run consecutively, but with sentence suspended and probation imposed on the second count. Petitioner Bianchi was given similar sentences of 10 years, with probation on the second count (R. 801–809).

The evidence for the Government may be summarized as follows:

On a 1951 pipe line construction project, the O. R. Burden Construction Company, which employed the crafts represented by petitioners, encountered numerous difficulties (R. 266–267, 306). The welders were working only four hours a day for a full day's pay (R. 420–421, 451); more men were put on the job than were necessary (R. 388–389, 394, 396, 417); labor costs were higher than for similar work in other comparable regions (R. 424). There was testimony, admitted solely as bearing on the state of mind of Mr. Burden who was told of the incident, that a steward named Blackwell, who had refused to hire two men sent to him with a letter from petitioner Thompson, had been assaulted (R. 401–405, 414–415, 449, 450).

In May 1952, when the Burden Company was getting ready to start upon another construction project, a pre-job meeting was held with the petitioners as representatives of the craft unions. Mr. Burden testified that, at the request of Callanan he had lunch with Callanan alone; that at such luncheon, he told Callanan about his difficulties and said that something drastic would have to be done if the company was to complete the project without great loss. Callanan then asked Burden how much money there was in the job and whether there could be one cent a foot on the project, a rate which would total $28,000 or $29,-

000 on the whole job. Callanan told Burden that the other crafts would share in the division but that the welders would get the greater share because they had not interfered with the construction company as had the other crafts; that he would talk to the crafts. Burden told Callanan that no payment would be made until a substantial portion of the work was done (R. 269–271).

Burden also testified that, after the project had been started in August 1952, he had a private meeting with Callanan in which he complained that petitioners were not living up to the agreement. Callanan assured him that the work would pick up and that he would talk with the other crafts (R. 274).

At the first meeting between Callanan and Burden it was agreed that payments to petitioners would be made by false invoices (R. 271). The Burden Company paid $28,000 on invoices from various companies or individuals for machinery which it did not use (R. 279–281, 331–338, 369–370).

Thompson, Foster and Secor were shown to have received money from the Washington Equipment and Construction Company which submitted bills to Burden (R. 352–356). Callanan had a friend set up a fictitious company which sent invoices to the Burden Company (R. 374–378, 381–384). In November 1952, Bianchi complained to Burden that he had not received his share of the payoff. Burden gave Bianchi two checks totalling

$2,516.00 made to the order of two names appearing on invoices (R. 275–277). In March 1953, Thompson made a similar complaint and thereafter a check for $3,980 payable to the Washington Equipment Company was sent to that company (R. 279).

In submitting the case to the jury (R. 662–704), the judge charged that if the defendants, as labor representatives, directly or through one of their number acting for the others, "made demands for money" to the Burden Company and "made express or implied threats" with respect to industrial strife unless such demands were met, and if such threats were wrongful, for the benefit of the defendants personally and not for the union members, and the Burden Company agreed to make the payments demanded because of fear, then the defendants "in so demanding and receiving the payment of such money under such circumstances from the Burden Company committed extortion" within the meaning of the Hobbs Act (R. 669–670). The judge also charged that "Even if you find that a defendant or defendants caused acts of violence or made threats or demands which caused fear in the mind of O. R. Burden, that in itself is not enough for a violation of the statute. You must further find that the acts of violence or threats were caused by a defendant or defendants with the intent at the time the acts or threats occurred to put O. R.

354159—55——2

Burden in fear of such violence or threats for the purpose of obtaining money or property" (R. 691–692). He said (R. 694–695):

> The mere receipt of money or anything of value by a labor representative of employees from the employer of such employees is not in itself sufficient to constitute an offense under the charges set forth in the indictment. It is incumbent under count two of the indictment for the Government to prove beyond a reasonable doubt that a defendant himself committed some act or acts, or caused them to be committed, and that the likely and intended effect of which would be to cause fear on the part of O. R. Burden, and that they were wrongful acts, and if the Government fails to prove fear, the defendants cannot be convicted under count one or count two of the indictment.
>
> Unless an intent to extort money or other thing of value existed in the mind of a defendant at the time of making a threat, if you find a threat was made, there can be no crime of extortion by fear.
>
> * * * * *
>
> Intimidation, as the word is used in the law of extortion, means putting in fear. In order to constitute extortion by intimidation, it is essential that the money given to the extorters be surrendered because of the apprehension of injury and compulsion of fear—fear of economic loss, fear of

> injury to workmen, fear of injury to property.
>
> The intimidation must be such as to cause a reasonable apprehension of danger. It is necessary that the fear be strong enough to induce one to part with his property under its compulsion.

In affirming the judgment of conviction, the Court of Appeals held, that, whether or not petitioners were shown to have been responsible for the labor difficulties on the prior project, the offense of extortion was established if "fear was created in the victim's mind, if such fear was a reasonable one, and if the defendants by making use of that fear extorted money or property" (Pet. App. 5a). It said (Pet. App. 4a–5a):

> It appears to us that the offense of extortion under the Hobbs Act has been committed if the defendants have illegally created fear in their victim, which fear has induced the victim to part with his money or property. If the fear is created in the victim for the purpose of extorting money or property, the offense is present whether the defendants are responsible for any past difficulties in the way of prior illegal strikes or unfair labor practices which may have created the fear, or whether the fear may have been created by what might have happened to others in similar cases.

The Court of Appeals was of the opinion that petitioners had not been shown to be responsible for the difficulties on the prior contract (Pet. App. 8a) and for that reason held that there was no

necessity to give an instruction under Section 6 of the Norris-LaGuardia Act, *supra*, pp. 3–4, with respect to the responsibility of union officers for acts of others (Pet. 8a–9a).

ARGUMENT

1. The main thrust of the petition for certiorari is based on a misconception of the opinion below as eliminating the element of threat from a Hobbs Act offense. Petitioners state that the court below "held that extortion may be found in the absence of any previous unfair labor practices or any threats of future unfair practices from the mere payment of money to a labor representative in the hope of better labor relations" (Pet. 11; see also Pet. 15–16, 20). But this was not the view of the court below. The Court of Appeals explicitly stated that the offense was established only: "If fear was created in the victim's mind, if such fear was a reasonable one, and if the defendants by making use of that fear extorted money or property" (Pet. App. 5a). Petitioner's play on Burden's fear to obtain money was thus, in the court's view, the gist of the offense. This element of play on fear, or threat, characterizes extortion and distinguishes bribery. Any doubt as to the court's meaning is dispelled by the fact that it went on correctly to hold that the essential threat could be express or implied, and concluded that "it was possible and proper in the light of all the evidence for the jury to

infer Burden feared that if the tribute demanded was not paid reprisals would be taken and labor difficulties designed to harass the employer and not to accomplish legitimate labor objectives would follow, and that fear on the part of Burden was reasonable and justifiable" (Pet. App. 7a). In other words, the Court of Appeals both stated that a use of fear or threat was an essential element of the offense and found that in fact the making of such a threat had been proved in this case.[1]

There is nothing startling about the interpretation of the statute by the court below. If, without any prior difficulties, a labor leader comes to an employer and expressly threatens that, unless he is paid a sum of money for his personal benefit, he will foment labor strife on a forthcoming project, and the employer pays him money under the reasonable apprehension that the threat will be carried out, there can be no doubt that this would be a classic case of extortion. In the instant case the threats were not that express because they did not have to be. The words used in the inter-

[1] For this reason, the recent decision of the Second Circuit in *United States* v. *Ryan*, holding that payment of money to a union leader in his individual capacity as a gift is not an offense under Section 302 of the Taft-Hartley Act, has no bearing on this case. Whatever the validity of that decision, which the Government is seeking to have this Court review (see petition for certiorari, *United States* v. *Ryan*, No. 281, October Term, 1955), it has no relevancy here, where the theory of the prosecution was that the money was extorted through play on fear, and not voluntarily given as a gift.

view between Callanan and Burden were given color by the background against which they were made. But, in order to convict, the jury had to find that those words carried a threat. The judge explicitly so instructed the jury (see Statement, *supra,* p. 7). The Court of Appeals has not held otherwise. The decision below is thus in accord with settled law. *Bianchi* v. *United States,* 219 F. 2d 182 (C. A. 8), certiorari denied, 349 U. S. 915.

2. Petitioners argue (Pet. 19–21) that it was error to permit evidence of labor troubles on the prior project to be introduced without an instruction as to the liability of union officers for the acts of others under Section 6 of the Norris-La Guardia Act, *supra,* pp. 3–4. While the Court of Appeals thought that the necessity for giving an instruction under the Norris-La Guardia Act was a close question, it held that since no unlawful acts in connection with the prior contract had been proved, the Norris-La Guardia Act did not apply (Pet. App. 9a). In any event, it thought that no prejudicial error had been shown (Pet. App. 9a–12a).

No valid objection can be made to the admission of the evidence as to prior labor troubles. The May 16, 1952, conversation between Callanan and Burden obviously took on meaning in the light of the background to which it related. It was necessary for the Government to show, not only that Burden was in fear, but that his

fear was a reasonable one. The Government had a right to prove that background, the nature of the fears on which petitioners were playing. To that end, the Government was certainly not required to rely merely upon Burden's statements to Callanan in the May 16 interview, but could show what had actually occurred, both to corroborate those statements and to show the reasonableness of Burden's fears. There is thus no doubt that the evidence as to prior labor difficulties was admissible.

It should be noted, moreover, that the evidence was limited for the most part to the purpose of showing the background to the May 16th conversation. The testimony as to the Blackwell assault was expressly so limited, despite petitioners' assertion to the contrary (Pet. 11), as the court below observed (Pet. App. 11a). It was so limited both in the charge (R. 692) and whenever testimony with respect thereto was introduced (R. 404, 415, 450). The judge also instructed the jury that the evidence as to statements made to Burden by his subordinates regarding trouble on the project was limited to the purpose of showing Burden's state of mind (R. 692). Some of the significant testimony as to labor troubles was introduced in that fashion (R. 421, 451). And beyond this, the trial court charged that the truth or falsity of the conflicting testimony on the May 16 meeting, against which the prior troubles were essentially only background, comprised "the

very heart of the issues formed by the testimony" (R. 684). Thus petitioners have no valid complaint with respect to the instructions regarding the significance of the prior labor difficulties.

More broadly, however, there is no merit to the contention (Pet. 19–21) that the judge should not have permitted the jury to determine whether the former labor troubles were attributable to some or all of the petitioners without giving them an instruction as to responsibility under Section 6 of the Norris-LaGuardia Act. That statute provides in pertinent part that no "officer or member of any association * * * interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof." It is established that, even where the charge is extortion or violation of some other criminal statute, if it arises in connection with a labor dispute, a charge must be given under the statute if the acts alleged to be criminal are to be attributed to the association or officer not directly responsible therefor. *United Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 403; *United States* v. *Kemble,* 198 F. 2d 889, 892 (C. A. 3), certiorari denied, 344 U. S. 893. But it does not follow that where, as in this case, the acts charged as criminal are performed by the defendants themselves for their own benefit and

not in connection with a labor dispute, the Norris-LaGuardia charge must be given as to any subsidiary facts which tend to prove the main charge.

There was no attempt in this case to hold petitioners "responsible" or "liable" for the labor difficulties on the prior project. Petitioners are being held "responsible" only for their *own* acts in extorting money from the employer for their own use by threats to use their power as labor leaders. The Norris-LaGuardia Act instruction, therefore, was not called for.

Under the circumstances the trial court properly permitted the jury to consider whether the prior difficulties were attributable to petitioners (R. 673; Pet. 8). The evidence as to the prior difficulties was related to the extortion charged insofar as it tended to explain petitioners' acts, the nature of the threat made, and the reasons why they were able to induce fear in the mind of Burden. To the extent that the whole conversation between Callanan and Burden included the tacit assumption of all parties that petitioners could control labor difficulties, and to the extent that petitioners capitalized on that assumption to get money for themselves, the prior difficulties were relevant. But in any event, since the jury could not have convicted petitioners without finding that Callanan's May 16th conversation with Burden carried a threat of future difficulties, quite apart from petitioners' responsibility for the prior difficulties, petitioners

could not have been prejudiced by this aspect of the instructions. Therefore, this aspect of the case presents no question calling for review by this Court.

3. In arguing that the judge should have explained to the jury the difference between a breach of trust penalized by Section 302 of the Taft-Hartley Act and extortion under the Hobbs Act (Pet. 21–22), petitioners are urging a point which was decided against them by the court below in *Bianchi* v. *United States,* 219 F. 2d 182 (C. A. 8), certiorari denied, 349 U. S. 915.

Petitioners' attempt to distinguish the *Bianchi* decision is based on their misinterpretation of the decision below as dispensing with the element of threat. That, as we have shown, is not correct. The judge explicitly and repeatedly in his charge instructed the jury that they had to find that petitioners made threats with the intent to extort. As in the *Bianchi* case (see Government's Brief in Opposition, No. 646, O. T. 1954, pp. 16–17), moreover, the judge specifically charged (R. 694):

> The mere receipt of money or anything of value by a labor representative of employees from the employer of such employees is not in itself sufficient to constitute an offense under the charges set forth in the indictment. It is incumbent under count two of the indictment for the Government to prove beyond a reasonable doubt that a defendant himself committed

> some act or acts, or caused them to be committed, and that the likely and intended effect of which would be to cause fear on the part of O. R. Burden, and that they were wrongful acts, and if the Government fails to prove fear, the defendants cannot be convicted under count one or count two of this indictment.

Thus the judge did adequately explain to the jury the difference between mere receipt of money by a labor leader and extortion through fear. Here, as in *Bianchi,* the jury were informed that petitioners could not be convicted unless they obtained the money from the employer by extortion through use of fear. That theory is wholly inconsistent with the possibility that the money was paid freely as a gift in the nature of a bribe. *People* v. *Feld,* 262 App. Div. (N. Y.) 909 (1941); cf. *Hornstein* v. *Paramount Pictures, Inc.,* 292 N. Y. 468 (1944).[2] And since no claim was made by petitioners that the money was received as a bribe, their evidence being to the effect that no money was asked for or received at all (see R. 520), there was no need for the judge to charge on the elements of some other offense not charged and not before the jury for consideration.

4. Petitioners urge another point rejected in *Bianchi,* that fear of economic loss is insufficient to make out a case of extortion under the statute

---

[2] For this reason, violations of Section 302 are not lesser offenses included within violations of the Hobbs Act. The elements of the offense are basically different.

unless accompanied by actual or threatened force or violence (Pet. 22–26). The contention was answered in the Government's brief in opposition in that case (No. 646, O. T. 1954, pp. 10–15). Without going into all the matters there discussed, we think it sufficient to point out that neither the language nor the legislative history of the Hobbs Act support petitioners' position.

Section (b) (2) of that Act, *supra,* pp. 2–3, defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." If "fear" were used in the definition only in the sense of force and violence, there would have been no need to include the term in the definition of extortion, particularly since the statute refers to actual *or* threatened force and violence. The word "fear" must therefore mean something different from fear of physical force and violence. That extortion may be predicated on compulsion other than physical force and violence is manifest from the definition itself, which provides that "color of official right" may serve as the compelling force. No showing of force and violence is required where compulsion of official right is used. *Ladner* v. *United States,* 168 F. 2d 771 (C. A. 5). Since fear of economic injury can be as compelling as violence or color of office, there is no reason why the compulsion of such fear should not be sufficient to constitute extortion.

Under the predecessor statute, the Anti-Racketeering Act of 1934, 48 Stat. 979, which, *inter alia,* punished obstruction of interstate commerce through use of "force, violence or coercion," the use of fear of economic injury through threats by labor leaders of a labor shutdown for purposes of personal gain had been held to constitute coercion. *United States* v. *Compagna,* 146 F. 2d 524 (C. A. 2), certiorari denied, 324 U. S. 867; *Nick* v. *United States,* 122 F. 2d 660 (C. A. 8), certiorari denied, 314 U. S. 687.

The elimination of the word "coercion" from the Hobbs Act was not, as petitioners contend (Pet. 24), designed to eliminate use of fear of economic coercion from the coverage of that statute. In the amended statute, Congress adopted an arrangement of the statute different from that of the predecessor and numerous changes of phraseology occurred. But the legislative history shows that the changes were designed to make the statute conform to the standard definitions of the New York Penal Code which had been followed by many states. 91 Cong. Rec. 11843, 11900, 11906, 11908, 11910. Before adoption of these definitions in the Hobbs Act, the courts of New York had construed the New York extortion statute to cover the use of fear of economic injury to induce another to turn over money or property for the personal use of the one making the demand. *E. g., People* v. *Barondess,* 133 N. Y. 649 (1892); *People* v. *Rosenzweig,*

265 N. Y. 323 (1934); *People* v. *Lamm*, 292 N. Y. 224 (1944); *People* v. *Bernoff*, 292 N. Y. 230 (1944). The Hobbs Act, which adopted the New York definitions, should be construed in the same way.

The fact that in the Congressional debates, reference was made to the use of violence (see Pet. 24–26) does not detract from the force of the foregoing considerations. The primary purpose of the Hobbs Act was to overcome the effect of the decision in *United States* v. *Local 807*, 315 U. S. 521, which had involved the use of violence to obtain standby wages for employees (see H. Rep. No. 238, 79th Cong., 1st sess., p. 10). Under these circumstances, it was natural that, in debate, reference would be made to the use of violence, as had occurred in the *Local 807* case. But Congress used language which on its face covered more than force and violence, and which had for years been construed to mean more than physical force and violence. There is no reason why that language should not be given its ordinary meaning.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1955.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 256

LAWRENCE CALLANAN, CARL BIANCHI, L. A. THOMPSON, WILLIAM POSTER AND R. M. SECOR, *Petitioners*,

v.

UNITED STATES OF AMERICA.

REPLY TO BRIEF OF UNITED STATES IN OPPOSITION TO CERTIORARI

The Government asserts in its opposition that we have misapprehended and misstated the opinion of the court below and the position which the Government now takes (Br. in Opp. 10-12). We do not think so. We said in our petition for certiorari that the Government makes the Hobbs Act indistinguishable from the ordinary payment for breach of trust. That this is true may be shown by the following hypothetical example:

Suppose A informs B, a bank cashier, that he is afraid that a loan which he has applied for at the bank will not be granted. The cashier tells him that for $1,000.00 he will

use his influence and see that the loan committee acts favorably.

It is clear that the cashier is receiving money for breach of trust. It is clear that he gets that money by representing that he is in a position to get the loan granted. It is clear that he is playing on the fear of A that he will not get the loan. There is the same implied threat that the Government relies on here, that if the money is not paid the cashier may use his influence against granting the loan. In this situation, according to the court's opinion and the Government's argument in this case, the cashier is guilty of extortion under the Hobbs Act.

If this be so, it is indeed a novel construction of the statute. No case has ever gone that far. It sweeps into the orbit of the statute any payment to anyone who promises to use his influence in breach of his trust, even in business affairs where such payments would not constitute the crime of bribery.

We assert that this broad construction of the Hobbs Act presents an important question which should be decided by this Court.

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INDEX.

Page

Petition for rehearing..... 1

Reasons for granting rehearing and issuing the writ 1

Conclusion 12

Cases Cited.

Bianchi v. United States, No. 646, Oct. Term, 1954....7, 11

Coolman v. State, 163 Ind. 503, 72 N. E. 568..... 6

Delaney v. United States, 1 Cir., 199 F. 2d 107..... 11

Holladay v. State, 20 Ala. App. 76, 101 So. 86..... 6

Mattox v. United States, 146 U. S. 140.. 5

Mills v. State, 97 Tex. Cr. 111, 260 S. W. 578..... 6

Remmer v. United States, 347 U. S. 227, No. 156, This Term 1, 5

State v. Pierce, 178 Iowa 417, 159 N. W. 1050..... 6

Wheaton v. United States, 8 Cir., 133 F. 2d 522.... .. 5

Rules Cited.

Federal Rules of Criminal Procedure:

Rule 21 (a).....10, 11

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 256.

LAWRENCE CALLANAN,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

Petitioner prays that this Court grant rehearing of its order of October 17, 1955, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Eighth Circuit in the above-entitled case as prayed for in the petition filed herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. On October 10, 1955, this Court granted certiorari in **Remmer v. United States**, No. 156, this Term, where the question presented was whether the evidence was sufficient to overcome a presumption of prejudice arising from

extraneous jury contacts. A related question in the instant case not previously presented is the following:

Whether there was a competent hearing to determine if a deputy marshal stated to a juror during the deliberations of the jury that there could not be a hung jury in Federal Court and whether the evidence was sufficient to overcome the presumption of prejudice arising from the marshal's communication to the juror.

Defendants below in their motion for a new trial presented, inter alia, the following issue to the trial court: "That there was an unwarranted communication by a United States Deputy Marshal in charge of the jury during the jury's deliberation and after the jury had been deliberating for a period of approximately six hours, which communication took place during the dinner hour allotted to the jury, and which communication was to the effect that there can be no hung juries in Federal Court, and that this jury would be kept locked up until such time as they reached a verdict; that this statement was allegedly made by the United States Deputy Marshal after one of the jurors stated in substance that it appeared that this would be a hung jury" (R. 759).

The incident complained of occurred after the jurors had deliberated five to six hours during their dinner hour (R. 769) and the verdict was returned about thirty minutes after they came back from dinner (R. 783). An affidavit of one Eleanor Kruger filed in support of the motion stated that a juror named Gladys Naeger told her that when the jury went to supper in the midst of their deliberations the deputy marshal in charge of the women jurors, in response to a juror's remark that it looks like it could be a hung jury, stated "Oh no, there cannot be a hung jury in a Federal Court" and that the jurors will be confined until they reach a decision (R. 763-765). A hearing was held and juror Gladys Naeger was called as a witness by defendants.

When she testified that nothing was said by the deputy marshal about a hung jury, defendants sought to cross-examine her on the statement which she made to Mrs. Kruger (R. 768-770). The court refused to allow such an interrogation and said: "You may ask the witness if any bailiff * * * made any such comment to her, but I'm not going to let you bring in jurors and let you put them on the stand and try to impeach them with respect to something they may have said to someone on the outside after the case is completed. I think it would be highly improper in any suit, after jurors have decided a case, that they then can be called into court, tried, and tried about comments made by people as to how they arrive at their verdict. Unless you have got some authority for some procedure, I don't think it is proper. But you may make any proper inquiries of anyone who sat on this jury or any other jury, but anyone outside of the jury is entirely immaterial" (R. 770).

The trial judge further would not let defendants question Mrs. Kruger about any statements that Mrs. Naeger made to her concerning a hung jury (R. 779). Defendants were also not allowed to interview any juror in regard to this matter. (Original Record, Proceedings and testimony at hearings on motions of Defendants, July 9, July 13, July 14 and July 19, 1955, p. 6.)

Defendants next called the deputy United States marshal Eileen Bequette who testified on direct examination that she did not recall any conversation or discussion pertaining to a hung jury, either going to or from dinner (R. 780). But examination by Government counsel went as follows (R. 780-781):

> "Q. Didn't some man over there ask you about what would happen if they had a hung jury?
>
> The Court: Was there any conversation between any member of the jury and you, and not what you may

have heard the jury discuss among themselves, but did any juror talk to you?

Q. Did a male juror ask what would happen if they had a hung jury? If they did, will you so tell the Court?

A. I believe so, yes.

Q. What did you say?

A. I said, 'I don't know.' "

She then testified that she did not communicate the juror's question to the Court. She also said that she did not tell anyone of the incident until she related it to Government counsel subsequent to the filing of the motion for a new trial in which the instant issue was raised.

Another deputy marshal, Tilden Delaney, testified that a juror asked him "if there was a hung jury, what would happen to the prisoners," and he stated that any prisoners on bond would remain on bond (R. 791). Eleven of the jurors denied hearing any communication from either marshal concerning anything and denied asking questions of either marshal (R. 782-783, 784, 785, 786-791). The other juror was not present at the time of the hearing nor was he questioned (R. 792).

The Court of Appeals found no error in the method of conducting the hearing and sustained the following finding of the trial court (R. 800):

> "Under this record we find: (1) that the only communication made to the jury during deliberation was that in the event of a hung jury those defendants on bond would be continued on bond; that the communication by a lady Deputy Marshal was without substance; (2) that the remarks or statements of neither Deputy Marshal, standing alone or coupled with the questions to which they replied, were prejudicial to either of defendants; (3) that there is no competent

evidence to sustain the allegations of paragraph 86 in the motion for new trial; (4) that the affidavit as well as testimony, offered to impeach the juror Naeger, is incompetent."

Remmer v. U. S., 347 U. S. 227, 229, sets forth the rule relative to communications to the jury as follows:

> "In a criminal case, any private communication, contact or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudiced, if not made in pursuance of known rules of the Court and the instructions and directions of the Court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of the defendant that such contact with the juror was harmless to the defendant. **Mattox v. United States**, 146 U. S. 140, 148-150, 13 S. Ct. 50; **Wheaton v. United States** (C. A. 8th, S. D.), 133 F. (2d) 522, 527."

The **Wheaton** case requires that the issues raised by a motion alleging such communication be competently tried. Here there was no competent trial and the government did not establish that the communication charged was harmless.

Defendants below were denied the right to cross-examine the juror Mrs. Naeger as to the prior inconsistent statement that the deputy marshal in charge of the women jurors said that there can not be any hung juries in the federal court. The court should have considered Mrs. Naeger's denial of any such communication in the light of this prior statement. The contradictions in the testimony of the woman deputy marshal also make further exploration of the issues mandatory. Initially after hearing the jurors deny the

incident, she specifically feigned no knowledge of the occurrence. But after leading questions by the government amounting to prompting, she admitted that a juror asked her about a hung jury and that subsequent to the filing of the motion she told Government counsel of the incident. And finally the fact that no juror remembered any conversation about a hung jury made the hearing incomplete. The testimony of the two marshals, the affidavit of Mrs. Kruger, the lack of knowledge by the jurors, all called for a more searching inquiry. The testimony of the woman deputy marshal and the jurors' lack of knowledge is indicative of the fact that both the deputy marshal and the jury are not prone to admit misconduct.

This was not a competent hearing which competently tried the issues raised by defendants' motion and the finding of the court that the communication was not prejudicial was erroneous. Moreover, this communication was made during the course of the jury's deliberations and therefore the presumption of prejudice was greater than a communication prior to submission of the case to the jury. Communications to jurors by bailiffs that the jury had no right to remain in disagreement, has been held prejudicial in various state courts. **Mills v. State**, 97 Tex. Cr. 111, 260 S. W. 578; **Holladay v. State**, 20 Ala. App. 76, 101 So. 86; **Coolman v. State**, 163 Ind. 503, 72 N. E. 568; **State v. Pierce**, 178 Iowa 417, 159 N. W. 1050.

2. Another substantial question not heretofore presented in the petition for certiorari is as follows:

Whether the trial court abused its discretion in refusing to grant a change of venue, or in the alternative an indefinite continuance, where prejudicial publicity was created by a grand jury report filed six days prior to the commencement of the trial especially in view of a background of publicity caused by a report issued by a prior

grand jury, by charges of the court to the grand jury and by other statements of governmental officials.

On June 8, 1954, just six days prior to trial, the grand jury of the district filed a report (R. 176-175), signed by the United States Attorney (R. 185), publicized in the press and radio (R. 185-204) which was critical of labor unions. The report alleged that unions improperly raised funds for political purposes (R. 178). It heaped abuse on union agents who allegedly used the "hiring hall system" to discriminate against contractors and whose financial interests in various businesses led to favoritism (R. 179-180). The attitude of union officials toward the grand jury was criticized (R. 180). Union men were accused of possessing pistols (R. 180-181). Union expenditures were described as loose and leading to "extravagance, if not fraud" on the part of union officials (R. 181). The report further alleged that union funds were a fertile field for mismanagement, that the heads of the fund were not qualified to manage them and that this was true in the case of "Thomas F. Callanan * * * the brother of **Lawrence Callanan**, business manager of Local No. 562" (R. 183). Complaint was also made about placement of insurance by union representatives under various welfare plans impliedly against the interest of the union (R. 183).

This report was superimposed on the publicity called to the Court's attention in **Bianchi v. United States**, No. 646, October Term, 1954, certiorari denied April 25, 1955. That publicity included an earlier report of July 23, 1953, which was returned the same day as a prior indictment that was superseded by the instant indictment. The first report brought glaring headlines in the press such as "Union rackets cost millions here" and "Area worst in U. S., Grand Jury reports" (pp. 9-20 of Defts. Ex. 32). Similar publicity appeared over the radios and television stations (Defts. Exs. 20, 21, 27, 27-A, 28, 28-A, 28-B [September 25, 1953] at R. 110-114).

That report stated in part (R. 128):

". . . In conclusion and again emphasizing the seriousness of the violations brought before this Grand Jury, we point out from the testimony heard by this body the great harm that has been done to the future of Metropolitan St. Louis and other communities in the Eastern District of Missouri.

"Working men have suffered irreparable losses due to the irresponsible leadership of these unions.

"Business men too have suffered losses which can never be regained.

"These losses have resulted in a general financial debility in the area because of decreased purchasing power, both by individuals and businesses.

"Thus workers and business men not directly connected with the despicable shakedown racket have suffered too, simply because they are unfortunate enough to live in a community which permits this racket to operate.

"Even worse, new industry cannot be attracted to a community where there is a possibility that it will be subjected to labor difficulties from the start.

"Firms long established in St. Louis, no matter how excellent their products, find it increasingly difficult to obtain orders. Their customers are hesitant about buying from companies who may be unable to keep delivery dates because they might be tied up by strikes.

"Worst of all, military orders, so necessary to the defense of this nation and the promotion of freedom throughout the world, have been and can be seriously impaired.

"This is truly a vicious circle, vicious in the strongest meaning of the world.

"While irreparable losses have been suffered by all St. Louis citizens and citizens of the St. Louis area,

and great harm has been done to their communities' futures, there is still hope.

"That hope lies in the individual citizen himself . . ." (R. 128).

* * * * * * * *

"Much of the evidence before this Grand Jury disclosed that labor racketeers carried revolvers with impunity, and on many occasions arranged it so that intended extortion victims, and workers who might complain, were able to see such weapons" (R. 123).

". . . Union meeting rooms are spotted with 'thugs,' friends of the business agents, who immediately silence, by violence or otherwise, any union member dissenting with the views of the union leaders . . ." (R. 125).

". . . Contractors and others feared for their lives at the hands of the racketeers . . ." (R. 126).

* * * * * * * *

"The rank and file members of labor unions have sustained loss of wages because of strikes, shutdowns, and the like, fomented by labor leaders, not for the benefit of the laboring man, but for the benefit of those leaders themselves solely as a means of the latter to enforce their shake-down demands on contractors. It should be emphasized here that the monies extorted by the labor racketeers went into their own pockets and not into the treasury of the unions . . ." (R. 119).

"Many contractors, particularly those from out of state, who have been victimized by labor leaders in Missouri, told this Grand Jury that they will not do any more work in this State because of their frightening experience here with labor in the past . . ." (R. 120).

"Contractors and the laboring man have been at the absolute mercy of these corrupt labor czars. The

latter, in most instances, in the Eastern District of Missouri, have refused to recognize National Labor Agreements . . ." (R. 121).

"Very frequently local labor leaders in this district have refused to allow out-of-state contractors, especially those constructing pipe lines, to bring in any of their skilled union workers, unless these foreign contractors would pay tribute to these labor leaders for this privilege . . ." (R. 121).

"If a contractor dared to disregard the demands of the extortionists, many means were used to enforce them, including such actions as shut-downs . . ." (R. 122).

". . . Contractors have been forced to pay 'rent' for non-existent equipment supposedly furnished by certain labor leaders . . . Contractors insisting on some form of receipt for their payoffs and refusing to make cash payments were furnished fictitious invoices for such rentals or services from these non-existent companies" (R. 123).

Petitioner filed three separate motions under Rule 21 (a), F. R. Crim. P., asking for a transfer of this case to another judicial district for trial, and also filed three motions for continuance (R. 17-30, 36, 41-45, 47). The third motion claimed that local prejudice had resulted in the report of the grand jury and United States Attorney's office concerning alleged abuses of labor unions and labor union representatives, which report was released just six days prior to trial with knowledge that the instant case was set for trial. This report specifically mentioned petitioner by name as a business manager of a local union whose brother was in charge of a Union Welfare Fund which he was not qualified to manage. The earlier motions alleged prejudice from the first report of the grand jury concerning its racketeering investigation. The motions also called attention to the charges of the district

judge to the grand jurors in November, 1953, and to newspaper and radio comment based on this report and these charges.

Certiorari was denied in **Bianchi v. United States**, No. 646, October Term, 1954, to a similar question. But in the **Bianchi** case the report of the grand jury was made on July 23, 1953, and the trial occurred six and a half months later. There was no second report six days prior to trial.

Rule 21 (a), F. R. Crim. P., provides for the transfer of a case to another district, "if the Court is satisfied that there exists * * * so great a prejudice against the defendant that he cannot obtain a fair and impartial trial * * *" This is clearly a case where the trial court abused its discretion in denying the motion for a change of venue or an indefinite continuance. Especially is this so in view of the second grand jury report mentioning the name of the defendant specifically which was filed shortly prior to trial.

This is not a case of mere wide-spread publicity but it involves publicity created by the very arm of the Government which was prosecuting the defendant. The granting of a continuance or a change of venue could not have made impossible this trial on the theory that it was merely a trial of considerable public interest which would have received publicity in any event. But the reports rather created an atmosphere conducive of convicting a labor representative and especially petitioner whose very name was mentioned in the report filed six days prior to trial. The Government should not be allowed to create or increase an atmosphere of prejudice and then require the accused to be tried in a prejudicial setting of its own making. We believe, therefore, that this case conflicts, in principle, with **Delaney v. United States**, 1 Cir., 199 F. 2d 107.

CONCLUSION.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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